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UNIVERSITY OF ALBERTA

His Majesty's Subjects: Political Legitimacy in Quebec, 1764 - 1791

by

Carolee Ruth Pollock

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

in

History

Department of History and Classics

Edmonton, Alberta

Spring 1996

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To Kathryn and Daniel

ABSTRACT

Political legitimacy was contested ground throughout the eighteenth century – in Britain, France and in the American colonies. The cession of Quebec to Britain by the Treaty of Paris in 1763 made it one more arena where the contest was played out. The question of what constituted legitimate authority was posed with particular urgency in the colony of Quebec because of its unique situation. Because they could not hold it by force, its governors and the policy-makers in London faced the task of establishing a stable and legitimate civil administration. To do this, they appealed to familiar rituals, myths and structures. The political order they sought to create was patterned after what they considered the British constitution to be. It was monarchical in that authority derived from the King, aristocratic in that power relations were based on status, and it was religious in that the sanction of God's ordination ratified and enforced the political order. The society upon which this political order was based was a personal, or face-to-face society, where people were linked together in a network of deference and obligation – a paternalistic and patronage society. Thus, the civil administration in Quebec reflected the assumptions held by the British elite about the nature of society and government.

But the colony of Quebec posed significant challenges to this conservative social and political order. Quebec's Catholic population could not be fit into the self-consciously Protestant model of the eighteenth-century British constitution. The seigneurs whom the governors believed should have filled the leadership roles according to their status as a landed aristocracy, were excluded from public life by their religion. The English-speaking

colonists held significantly different conceptions of what constituted a legitimate political order. They clamoured for a legislative assembly, excluding the Catholic Canadiens from participation without qualm. In their view, legitimate authority derived from their participation in government. They regarded themselves as citizens of a state rather than as subjects of the King. Conflict between the military and the civilian population also tested the legitimacy of the governors' authority and of the institutions of civil administration.

Acknowledgements

I would like to thank my supervisor, Doug Owram, both for accepting me as his student and for his help and advice during the writing of this dissertation. His comments were always thought-provoking and insightful. I can never adequately express my appreciation for the help of the late Philip Lawson. His interest in the eighteenth-century Atlantic world was truly infectious but his kindness and encouragement were even more important.

A doctoral fellowship from the Social Sciences and Humanities Research Council made the research for this dissertation possible and a University of Alberta Dissertation Fellowship enabled me to complete the writing. I wish to thank the Public Record Office, the British Library, the Bodleian Library, and the Devon Record Office for permitting me to use their manuscript collections and for their assistance. I would also like to thank the National Archives of Canada for the use of their materials in Ottawa and for the use of microfilm on inter-library loan. Patricia Kennedy, the pre-Confederation archivist, was particularly helpful in sharing her wealth of knowledge and in facilitating contacts with others in the field.

Thanks are due to Elaine Chalus and Bruce Campbell for sharing their home and so much more with me when I was in England. In Ottawa, Tim and Kate Langford opened their home to a stranger and became friends. Doug Hindmarsh very kindly lent both his computer and his help in the final formatting and printing. Naomi Nind and Nanci Langford offered their friendship and encouragement throughout the entire programme. I especially wish to thank Margaret Fitch for her expert help in editing this dissertation, help generously offered and given at a most difficult time. I appreciated the comments of the late Douglas Fitch on legal matters and am sorry that he was not well enough to read the chapter on the courts. I would have enjoyed discussing it with him. I am deeply grateful to Barbara Smith for her friendship and support, expressed in so many ways.

Finally, I wish to thank my mother, Pearl Pollock. Her love and support have been indispensable, both in this process and in everything else.

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Introduction

Political legitimacy was contested ground in the eighteenth century – in Britain, in France and in the American colonies. From the revolution of 1688 to the reforms of the 1830s, the issue of what constituted legitimate authority was always in contention. Britain, profoundly shaken by regicide and civil war in the previous century, sought to work out new definitions of political legitimacy even while appealing to the "ancient constitution" for their justification. This was not a society oriented to innovation. As Paul Langford has argued:

> The political processes set in motion by the defeat of Stuart absolutism, the strategic and commercial implications of competition for trade and empire, the social consequences of demographic growth, urbanization, and industrialization, and the intellectual strains imposed by the impact of scientific enlightenment on conventional patterns of belief, all contributed to the sense of a society in turmoil. Yet the resulting transformation had to be accommodated by a mentality instinctively hostile to the concept of evolution, let alone revolution, in its modern progressive sense, and thoroughly self-conscious about its veneration for the past.[1]

The contest between various conceptions of political legitimacy has been examined in such widely various places as the pamphlet literature justifying the revolution of 1688[2], the growth of political stability under Walpole[3], the Jacobite threat before 1745[4], the instability of ministries at mid-century[5], the popular politics of John Wilkes in the 1760s[6]

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[1] Paul Langford, Public Life and the Propertied Englishman, 1689-1798, (Oxford: Clarendon Press, 1991), Preface, v.

[2] Lois G. Schwoerer, "Locke, Lockean Ideas and the Glorious Revolution," Journal of the History of Ideas 51, (Oct-Dec 1990); G.M.Straka, "The Final Phase of Divine Right Theory," in The Revolution of 1688, edited by G.M.Straka, (Lexington: 1968); M.P.Thompson, "The Idea of Conquest in Controversies over the 1688 Revolution," Journal of the History of Ideas 38 (Jan-Mar 1977): 33-46; J.G.A.Pocock, Three British Revolutions: 1641, 1688, 1776, (Princeton: Princeton University Press, 1980).

[3] J.H.Plumb, The Growth of Political Stability, (London: Macmillan, 1967.

[4] Eveline Cruikshanks, Political Untouchables: The Tories and the '45, (London: Duckworth, 1979); Paul Monod, Jacobitism and the English People, 1688-1788, (New York: Cambridge University Press, 1989).

[5] Lewis Namier, The Structure of Politics at the Accession of George III, (London: Macmillan, 1929); Ian R. Christie, Stress and Stability in Eighteenth-Century Britain, (Oxford: Clarendon Press, 1984); Richard Pares, King George and the Politicians, (Oxford: Clarendon Press, 1953).

and the American Revolution.[7] It was in the thirteen colonies in the 1760s and 1770s, of course, that the conflict became most acute. Even before the Revolution itself, contending definitions of legitimate authority abounded. No Taxation without Representation! Taxation No Tyranny! The slogans of the opposing camps encapsulate the debate, which was carried out in the speeches and actions of both the colonial assemblies and the British Parliament, in the political literature on both sides of the Atlantic and in the public unrest and political demonstrations of the ordinary people in London and in the colonies.

The cession of Quebec to Britain by the Treaty of Paris in 1763 made it one more arena where the contest was played out. The question of what constituted legitimate authority was posed with particular urgency in the colony of Quebec because of its unique situation. Acquired by conquest rather than by settlement, the colony's loyalty or at least, acquiescence in the change of rule, could not be taken for granted. The British had taken the colony by force; they could not hold it by force.[8] And the inhabitants were Catholic. In the event of the expected renewal of war with Catholic France, how could the quiescence of the Canadiens, "His Majesty's new subjects", be assured? The turmoil in the colonies to the south only exacerbated the situation. To look at the question of political legitimacy in this context is to examine one of the most significant and troublesome issues of the eighteenth century.

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[6] John Brewer, Party Ideology and Popular Politics at the Accession of George III, (Cambridge: Cambridge University Press, 1976); Nicholas Rogers, "Popular Protest in Early Hanoverian Britain," Past & Present, 79 (1978):70-100; George Rudé, Wilkes and Liberty: a social study of 1763 to 1774, (Oxford: Clarendon Press, 1962).

[7] Bernard Bailyn, The Ideological Origins of the American Revolution, (Cambridge, Mass.: Harvard University Press, 1967); Ian R. Christie, Wars and Revolutions: Britain, 1760-1815, (London: Edward Arnold, 1982); J.C.D.Clark, The Language of Liberty, (Cambridge: Cambridge University Press, 1994); John Derry, English Politics and the American Revolution, (London: Dent, 1976); Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America, (New York: W.W. Norton & Company, 1988).

[8] Nor did they attempt to hold it by force. From a garrison of nearly 12,000 men in 1760, the numbers quickly declined to less than 4,000 in 1763 and to only 1100 in 1766. Fernand Ouellet, "The British Army of Occupation in the St. Lawrence Valley, 1760 -74: The Conflict between Military and Civil Society," in Armies of Occupation, edited by Roy A. Prete and A. Hamish Ion, (Waterloo: Wilfrid Laurier University Press, 1984), p. 38.

The process by which the British colonial administrators – the Governors and other high-ranking officials in the colony as well as those responsible for colonial administration in London – sought to establish and legitimate a civil administration in the colony of Quebec, then, provides an opportunity to study not only what members of the British elite thought about political legitimacy, but what they did about it. As they sought to erect a stable social and political order, they made reference to the familiar ideas, structures, and procedures which made up that order in England. The political order they sought to create was patterned after the much lauded British constitution, or at least what these men perceived the constitution to be. It was monarchical in that authority derived from above, from the King. It was aristocratic in that power relations were based on inherited status. And it was religious in that the sanction of God's ordination ratified and enforced the political order.[9] The society upon which this political order was based was a personal, or face-to-face society, where people were linked together in a network of deference and obligation – a paternalistic and patronage society. Thus, the civil administration of Quebec reflected the assumptions held by the British elite about the nature of society and government.

However, significant challenges to this conservative social and political order arose in the colony. Some of these were posed by the particular colonial situation.Quebec's Catholic population could not be fit into the self-consciously Protestant eighteenth-century British constitution.[10] Although the Canadiens were familiar with the social relations of a kingdom – France was an absolute monarchy – the tradition of the much-venerated

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[9] J.C.D. Clark, English Society, 1688-1832: Ideology, social structure and political practice during the ancien regime (Cambridge: Cambridge University Press, 1985),p. 6. I borrow Clark's depiction of British society as Anglican aristocratic and monarchical only with qualification. The members of the elite who were concerned with governing Quebec certainly assumed that this was the proper understanding of society. Whether this was an accurate perception or whether they believed that their society met this standard is much less certain. Nevertheless, when they turned to the task of governing Quebec, what mattered is what they thought made for a proper and stable social order.

[10] Ireland was the other part of Britain's empire where the bulk of the population was Catholic. The Governors did not draw many parallels between Ireland and Quebec for a number of reasons: Ireland's proximity to England, its history of Jacobitism and the very different demography of its land-holding elite, for example. See Robin Close, " 'Child of Inordinate Power': Religion and Politics in Britain after the Quebec Act," M.A., University of Alberta, 1993, for a discussion of the response in Britain to the concessions granted to Catholics in Quebec by the Quebec Act of 1774.

British constitution did not exist in the colony. Nor could an exact replica of the constitution be easily created. The "ancient constitution" balanced King, Lords and Commons – who would take the place of the aristocracy or the elected members of Parliament in Quebec? Surely not the Catholic Canadiens. The seigneurs, whom the governors believed should have filled the leadership roles according to their status as a landed aristocracy, were excluded from public life by their religion. The Governors soon found that other familiar institutions could not be transplanted successfully either.

Other challenges were mounted by the disaffected in the colony – the English merchants, in particular – who were beginning to think about the polity in rather different ways. The English-speaking colonists held significantly different conceptions of what constituted a legitimate political order. They clamoured for a legislative assembly, excluding the Catholic Canadiens from participation without qualm. In their view, legitimate authority derived from their participation in government. They regarded themselves as citizens of a state rather than as subjects of the King.

The commercial world they inhabited was one where social relations were mediated through law, through contract and through money. These social relations conflicted with a political order where relations were personal and oriented to status. These two conflicts – the tension between the "ancient constitution" and the colonial situation and the tension between the differing conceptions of the civil order held by the British administrators and the merchants – made for interesting politics in the years between 1764 and the passage of the Quebec Act in 1774. They also provide an opportunity to examine the question of political legitimacy in an arena heretofore unexplored.

My focus will not be on the French inhabitants of the colony – the Canadiens, or His Majesty's new subjects, as the Governors invariably termed them – or on their response to the establishment of civil government. Some justification for this choice may be made. They are relatively voiceless in the official documentation of the period. Although they

were often the object of governmental concern, as will be shown below, they were seldom heard from directly. Of course, they may have engaged in the types of anonymous popular protest described by E.P.Thompson in his article "Patricians and Plebs," but this does not appear in the official record.[11] One possible example of such activity occurred in 1775. A statue of George III had been presented to the city of Montreal by His Majesty sometime in 1763 or 1764 and placed in the Place d'Armes. On 1 May 1775, it was painted black, a string of potatoes was hung around its neck and a mitre placed on its head. A placard with the caption, "Voici le pape du Canada et l'ivrogne d'Angleterre," was added in explanation.[12] Given the timing, the day after the Quebec Act came into effect, it is more likely that this protest was directed against that Act by some of the English-speaking colonists.

The Canadiens were, of course, a conquered people. The British held the monopoly of coercive force in the colony and the Canadiens lacked access to the traditional means of political expression, at least until 1774. As Catholics, they were almost entirely excluded from public office by the Test Acts. The only newspaper in the colony, the Quebec Gazette, although published in both French and English, was very much a paper of the English minority. No legislative assembly was elected in the colony before 1791.

From time to time the English-speaking merchants of Montreal or Quebec secured the signatures of some Canadiens on a petition or memorial, sometimes, it appears, without their full knowledge of what they were signing. They seldom spoke on their own account, at least not in the official documents. Instead, these documents preserve the pronouncements of the elite and, to a certain extent, the challenges of the merchants. The

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[11] E.P.Thompson, "The Patricians and The Plebs," in Customs in Common (London: Merlin Press, 1991), pp. 69-71.

[12] A reward of one hundred guineas was offered but the culprit was never discovered. The statue was later destroyed and the head thrown into a well, from whence it was rescued by Edward William Gray, the Provost Marshall of Montreal. It was presented to the National Historical Society in 1826. Bust of George III, McCord Museum, Montreal, M15885.

response of the Canadiens to the new government is not captured in these documents to any great degree. Thus, this examination is incomplete.

Yet there is something to be heard in this silence. As the colonial administrators understood it, government was articulated from above. They did not appeal to the will of the people for its legitimacy, but to the decree of heaven. The duty of His Majesty's new subjects was obedience and quiet submission, not the sort of response that would leave a trace in official documents.[13] However, the Governors did not lament the restlessness of the Canadiens or seek to discipline unruly subjects amongst them, so presumably they were successful in gaining at least their tacit consent.

A.L. Burt told the story of The Old Province of Quebec in 1933; Hilda Neatby revisited the subject for the Centenary Series in 1966 in Quebec: The Revolutionary Age, 1760-1791.[14] Burt wrote what one might call heroic history. He sought to understand the key figures of the day, Governors Murray, Carleton, Haldimand and the members of the ruling elite, in terms of their characters and personalities. His very thorough research and smooth narrative set a formidable precedent but he was also willing, in keeping with the standards of his time, to interpolate from the evidence he had, the motivations and emotions of his characters. And to evaluate them in quite personal terms: Governor James Murray was hot-tempered but sincere; Williams Conyngham, a lawyer in the

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[13]"Whilst all citizens are subjects, not all subjects are citizens, and whilst people may simultaneously be both subjects and citizens, changes in the distribution of weight between these two roles express alterations of prime importance in the character of government. Subjects do not acknowledge the same obligations as do citizens. They are likely, if politically aware, to be conscious principally of being governed, rather than of playing any significant part in the shaping of that government.....A subject may accept subjection as legitimate. But as a mere subject she is not a participant in the activity of governing, the activity whereby she is subjected. Citizenship contributes another dimension. The citizen engages in politics and by so doing authorizes and influences government....A shift in emphasis from the role of subject to that of citizen can thus involve a greatly increased sense of both rights and their violation. The obligation of people to be subjects as well as citizens can in these circumstances seem dependent on the proper fulfilment by government of its own obligations to those whom it rules." Rodney Barker, Political Legitimacy and the State (Oxford: Clarendon Press, 1990), p. 3.

[14]A.L. Burt, The Old Province of Quebec (Minneapolis: University of Minnesota Press, 1933); Hilda Neatby, Quebec: The Revolutionary Age, 1760-1791 (Toronto: McClelland and Stewart, 1966).

colony, was a scoundrel; George Suckling and William Gregory were hopelessly inadequate to their roles as Attorney General and Chief Justice respectively. We no longer believe so readily in heroes and villains; perhaps we are less sure of the individual's capacity to shape history. We seek more complex explanations.

In her account of the period in question, Hilda Neatby was caught up in the nationalist tensions of English Canada and French Canada, as befitted the decade in which she wrote. Her questions seem to be almost counterfactual. If the Governors, James Murray and Guy Carleton, had been more assiduous in their efforts to assimilate the French, if they had obeyed the instructions given them by the Privy Council, would Canada be wracked by conflict between French and English in the twentieth century?

These historians also share a trait common to much Canadian historical writing, the rather whiggish tendency to regard the period before 1867 as the prologue to the creation of the nation of Canada. We generally divide the field into pre-Confederation and post-Confederation history. To a certain extent, it is inevitable that our historical questions should be shaped by our present-day concerns, but we need to be aware of what might be obscured by this particular perspective. Neither the colonists nor the colonial administrators understood themselves to be engaged in building a future North American nation. They were not proto-Canadians. Nor did they see themselves as moving towards responsible government, democracy or national self-determination. Or towards anything at all. Rather, they sought to solve the problems of their day by reference to the values and traditions of that day.

The establishment of political legitimacy in the colony of Quebec was the primary task of its governors. To create a legitimate administration, the governors turned first to the law. Therefore, they felt themselves bound by the terms of the capitulations of Quebec and Montreal and the Treaty of Paris. They appear as defenders of the rights of the Canadiens both because of their reverence for the law, particularly the treaties that

guaranteed the Canadiens certain rights, and because it was good pragmatic policy. Both the retention of French civil law and the accommodation offered to the Catholic church can be seen in this light. But their model was the British constitution, which they regarded as superior to all others. Both the structures they set up and the means they used to legitimate the new regime offer significant insights into what they understood the nature of the constitution to be.

The nature of the eighteenth-century British polity has been the focus of much historiographical conflict. If Lord Macaulay believed that the eighteenth century was a "period of progress in civil rights, in religious toleration, in commercial and cultural enterprise, and, naturally, in imperial expansion," few present-day historians would accept such a depiction without caveat.[15] Herbert Butterfield's short but extremely influential work, The Whig Interpretation of History, made historians aware of the dangers of shaping the narrative of the past in terms of progress towards the modern world.[16] In the late twenties and early thirties, Lewis Namier taught historians to doubt the nineteenth-century Whig interpretation exemplified by the work of Macaulay by arguing that the politics of the mid-eighteenth century could best be understood as a conflict between factions seeking personal advancement rather than as a conflict between parties seeking to promote specific political principles. Interest rather than ideology provided the motive force of the period.[17] Although Namier cast a long shadow, eventually the concept of political ideas was rehabilitated. Bernard Bailyn's Ideological Origins of the American Revolution and John Brewer's Party Ideology and Popular Politics at the Accession of George III are representative of a body of work that returned to an examination of political ideas, often in new contexts: colonial unrest and extra-

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[15]Linda Colley, "The Politics of Eighteenth-Century British History," Journal of British Studies 25 (1986): 359-379.

[16]Herbert Butterfield, The Whig Interpretation of History (London: G. Bell and Sons, 1931).

[17]Lewis Namier, The Structure of Politics at the Accession of George III (London: Macmillan, 1929); England in the Age of the American Revolution (London, 1930).

parliamentary agitation, for example.[18] E.P.Thompson and other Marxist scholars looked to the eighteenth century to find the genesis of nineteenth-century radicalism in popular resistance to elite domination, thereby adding a new type of "whiggish" twist to the history of the period.[19] If these scholars focussed on the opposition to the ruling elite, J.H. Plumb in The growth of political stability in England, 1675 - 1725 reminded his readers that it was as important to study the mechanisms by which the elite maintained its hegemony.[20]

More recently, Jonathan Clark has rather intemperately attacked "left-liberal" scholars for their emphasis on "modern" elements in the conflicts of the eighteenth century, arguing that such a present-minded perspective has obscured the extent to which eighteenth-century Britain was an ancien regime. Specifically, Clark argues that religious and aristocratic ideas dominated the landscape: "The 'old society' until 1828-32 had three essential characteristics: it was Anglican, it was aristocratic, and it was monarchical."[21] Clark's polemic has understandably invited vehement rejoinder,[22] but he has been successful in reminding historians that this period like all others was characterized by continuity as well as change. A society may be profoundly conservative, and yet be challenged quite strenuously.

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[18]Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, Mass.: Harvard University Press, 1967); John Brewer, Party Ideology and Popular Politics at the Accession of George III (Cambridge: Cambridge University Press, 1976); Linda Colley's, In Defiance of Oligarchy: The Tory Party, 1740-60 (Cambridge: Cambridge University Press, 1982), in which she argues that the Tory party continued to function well into the eighteenth century also fits within this genre.

[19]E.P.Thompson, The Making of the English Working Class (Harmonsworth: Penguin, 1968).

[20]J.H.Plumb, The growth of political stability in England, 1675-1725 (London: Macmillan, 1967).

[21]J.C.D. Clark, English Society, 1688-1832: Ideology, social structure and political practice during the ancien regime (Cambridge: Cambridge University Press, 1985), p. 6.

[22]Joanna Innes, "Review Article: Jonathan Clark, Social History and England's `Ancien Regime'," Past & Present no. 115 (1987) 165 -200;W.A. Speck, "The Eighteenth Century: England's Ancien Regime," British Journal for Eighteenth-Century Studies 15, 2 (1992), 131-133; W.A. Speck, Will the Real Eighteenth Century Please Stand Up?" Historical Journal 34, 1 (1991) 203-206; Roy Porter, "Georgian Britain: an ancien regime?" British Journal for Eighteenth-Century Studies 15, 2 (1992), 141-144.

In Quebec as in Britain, the constitution was challenged in important ways in the eighteenth century. In the first place, the situation in Quebec necessitated alteration – the colony was not a blank slate upon which the new administrators could write what they wished. For example, the three pillars of the balanced constitution were King, Lords and Commons. And after 1688, the English constitution required that all three be Protestant. In Quebec, the only analogue to the Lords was the seigneurial class, but they were excluded from a public role by their Catholicism. Nor could a reasonable analogue to the Commons be devised. As Catholics, the Canadiens could neither vote nor be elected to an assembly. The very small number of Protestants in the colony could not be regarded as representative of the Catholic majority. Clearly, the "ancient constitution" would have to be modified to fit the colonial situation. The changes made reflect the priorities the colonial administrators placed upon various aspects of the constitution.

Like Britain itself, the society of Quebec was just beginning an important transformation from one mode of social organization to another. The transformation was much larger than simply the substitution of one colonial ruler for another. The British elite sought to establish the familiar order based upon personal dependency and hierarchical obligation – a kingdom. But in Quebec as in Britain, the commercial world was one where social relations were mediated through law, through contract, through bureaucracy, and through money – the characteristics of a modern state. In the nineteenth and twentieth centuries, this new mode of social organization would almost completely supplant the old order. In Quebec in the years after 1760 the tensions which would eventually result in the making of the modern state can be clearly seen as the governors and the merchants battled over the form the civil government would take.

To term the old order a kingdom requires some explanation. It is not meant merely as a description of the political aspect of social organization. A kingdom was more than a society with a king; it was a society organized in a hierarchical way. The primary model

of an individual's relation to the polity was that of a subject to the King, but on a day-to-day basis, the individual experienced that relationship as the relationship of an inferior to a superior, whether as a tenant to his landlord, an apprentice or servant to his master, a soldier to his officer, a wife to her husband, or a child to his father.

All modes of social organization appeal to a particular model of society for explanation and justification – for legitimation, in short. Eighteenth-century Britain was no exception. In this case the legitimating notion was that societal organization was ordained by God and that the model was the patriarchal family. The origins of society were sought in the Biblical account of the creation of Adam and of the divine grant to him of dominion over creation and over Eve.[23] The dominion of fathers over their children required less justification – it was regarded as natural and inevitable.

The doctrine of the divine right of kings had received its fullest English expression in the works of Sir Robert Filmer in the seventeenth century.[24] Filmer argued that absolute obedience to the king was required of all by divine law because all kings derived their authority from the unlimited sovereignty given to Adam by God at the Creation.[25] Behind this assertion lay the model of the unlimited power of fathers over their households – wives, children and servants. Although the Revolution of 1688 had necessitated a good deal of back-pedalling and rationalizing on the subject of the indefeasible divine right of kings, J.C.D. Clark makes a very strong case for the survival throughout the eighteenth century of an understanding of monarchy as divinely

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[23]Genesis, chapters 2 and 3.

[24]Sir Robert Filmer, The Freeholders Grand Inquest (1647/8); The Anarchy of a Limited or Mixed Monarchy (1648); Observations Concerning the Originall of Government (1652); Observations on Aristotle's Politiques Touching Forms of Government (1652); Directions for Obedience to Governors in Dangerous or Doubtful Times (1652); Patriarcha (1680) in Patriarcha and Other Political Works, ed. Peter Laslett, (Oxford: Blackwell's Political Texts, 1949); Gordon J. Schochet, Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England (Oxford: Basil Blackwell, 1975).

[25]Schochet, p. 7.

ordained and patterned after the rule of fathers – a Providential rather than an indefeasible divine right of kings. Linda Colley seems to agree with Clark at this point:

> To legitimize the rule of these new, assertively Protestant monarchs, apologists abandoned appeals to the divine right of kings, a doctrine that had always posed enormous problems, and took their stand instead on both divine providence and the people's will. They argued that William of Orange had vanquished James II in 1688, and that the Hanoverian dynasty had succeeded to the British throne in 1714 because divine providence had willed it. Yet again, a Protestant deity was watching over his chosen people. But God favoured the Protestant kings in this manner only because they had agreed to carry out their responsibilities to their subjects as the Stuarts had so lamentably failed to do. A religious foundation of the monarchy and the idea of a contract between ruler and ruled were thus, at least in theory, satisfactorily squared.[26]

Filmer's idea of an unbroken succession from Adam may no longer have been tenable, and limits may have been placed on the absolute rule of the monarch but many were prepared to argue and even more to assume that the institution of monarchy derived its legitimacy from its divine ordination.[27] Although the royal prerogative had been reinterpreted by the mid-eighteenth century, it was never denied. J.G.A. Pocock quotes Gibbons writing as late as 1790: "The accession of a British King reconciled them [the Jacobite country gentlemen] to the Government and even to the court; but they have since been accused of transferring their passive loyalty from the Stuarts to the family of Brunswick; and I have heard Mr. Burke exclaim in the House of Commons: 'They have changed the idol, but they have preserved the idolatry.'"[28]

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[26]Linda Colley, Britons: Forging the Nation, 1707-1837, (London: Pimlico, 1994; first published, New Haven: Yale University Press, 1992), p. 48.

[27]J.C.D. Clark, English Society, 1688-1832: Ideology, social structure and political practice during the ancien regime (Cambridge: Cambridge University Press, 1985) pp. 124-125 and *passim*; Gordon J. Schochet, Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England (Oxford, Basil Blackwell, 1975). See also M.P.Thompson, "The Idea of Conquest in Controversies over the 1688 Revolution," Journal of the History of Ideas 38 Jan-Mar 1977, pp. 33-46; G.M.Straka, "The Final Phase of Divine Right Theory," in G.M.Straka, ed., The Revolution of 1688 (Lexington, 1968).

[28] J.G.A. Pocock, "Political Thought in the English Speaking Atlantic, 1760-1790 Part 1: the imperial crisis," in The Varieties of British Political Thought, 1500-1800, edited by J.G.A. Pocock, (Cambridge: Cambridge University Press,

At one time scholars seemed to assume that once an idea or doctrine had been shown to be logically untenable (according to their standards), it was abandoned. Thus, they assumed that once John Locke masterfully refuted Filmer's arguments in his Two Treatises of Government,[29] the new contractarian model of society immediately supplanted the older patriarchal one. For example, Gordon Schochet argued that Benjamin Hoadley (a disciple of Locke) "was the harbinger of the next step in the development of political discourse, but . . . divine right patriarchalism belonged to an earlier age." Although Schochet acknowledged that there were exponents of the theory in the eighteenth century, he said, "they were all curiously out of place and seemed to recognize that their doctrine had been by-passed. . . . It was almost as if the end of the Stuart period signalled the demise of patriarchalism as a viable explanation of political realities."[30] But neither Locke's attack on Filmer's doctrine of absolute monarchy nor the political success of the Whigs immediately resulted in a wholesale rejection of the patriarchal model of society. Certainly, Lockean ideas justified the Glorious Revolution of 1688 and were taken up by the Whigs in its defence.[31] The Two Treatises of Government also became very popular in the thirteen colonies in the years before the American Revolution, again as a convenient defence of the right of revolution. It is perhaps ironic that the government that based its legitimacy on the Glorious Revolution should find it so difficult to accept those same ideas when articulated by the American

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1993). pp. 250-251; Pocock argues that "Britain was still a personal monarchy -- it can be argued that George III was the last great personal monarch in its history." p. 246

[29]John Locke, Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960).

[30]Schochet, pp. 223 - 224. A wonderful example of what Quentin Skinner decried in his critique of the history of ideas, "Meaning and Understanding in the History of Ideas," History and Theory 1969. pp. 11, 12.

[31]Locke originally wrote the Two Treatises between 1679 and 1683 during the Exclusion Crisis, but the work was not published until 1689 when with minor revisions it became a justification for the Glorious Revolution. Peter Laslett established this chronology for its authorship in his 1956 edition. Peter Laslett, ed., Locke's Two Treatises of Government, a Critical Edition with an Introduction and Apparatus Criticus (Cambridge: Cambridge University Press, 1956).

colonists. It was, in fact, the justification of revolution against the king in both cases that was the valuable kernel in the Lockean concept of government. But even in Locke's Second Treatise, this right only applied in extreme situations.[32] In the ordinary course of affairs, submission to the divine order was the duty of the subject. When J. Pownall, writing on behalf of His Majesty's Secretary of State Lord Dartmouth, referred to the "unnatural rebellion" in the colonies, he expressed the common idea that the American colonists were in violation of the natural order of things.[33] In short, Tories and Tory ideas survived into the eighteenth century. Although Jacobitism never came close to restoring the Stuart monarchy, it too survived into the eighteenth century in the realm of ideas, in popular culture and in extra-parliamentary politics.[34] Part of the reason for this survival was the fact that many were not prepared to abandon belief in a divinely ordained monarchy with all that it entailed.

It is probably safe to assert that more people encountered patriarchal ideas in the form of the Anglican Prayer Book Catechism than ever read Locke's Two Treatises or any other political pamphlet. And for most people, greater authority attached to the Catechism than to political argument however persuasive. According to explanations of the Fifth Commandment in the Catechism, the commandment to honour one's father and mother included the duty to honour and obey the king as a Civil Parent.[35] The authority of the king was identified with the divinely ordained paternal authority and was regarded as identical in origin. Even if, then, the direct link between the sovereignty of Adam and

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[32]John Locke, Second Treatise of Government, ed. C.B. Macpherson, (Indianapolis: Hackett Publishing Company, 1980), pp. 103 - 107.

[33]J. Pownall to Guy Carleton, 8 September 1775, British Library, Add. MSS. 21697, f. 106; Similar sentiments were expressed by Carleton in his letters to Major General Phillips, 13 January 1777, and to Captain Fraser, 7 April 1777, British Library, Add. MSS. 21699, ff. 80, 99, 100.

[34]Linda Colley, In Defiance of Oligarchy; Eveline Cruikshanks, Political Untouchables: The Tories and the '45 (London: Duckworth, 1979); Paul Monod, Jacobitism and the English People, 1688-1788 (New York: Cambridge University Press, 1989).

[35]Schochet, pp. 68 - 84.

the sovereignty of the king was disputed, the model retained its power. As Clark argues, "the essence of patriarchalism was hierarchy and divinely appointed, inherent authority, not the lineal descent of the monarch from Adam."[36]

Perhaps even more significantly, throughout the dispute over patriarchalism, no-one challenged the authority of the father over his household. English households continued to be organized on the patriarchal model, with the supreme authority of the father over wife, children and servants intact. Everyday experience reinforced the understanding of society as a closely knit, hierarchical order. As Soame Jenyns put it in 1757:

> The Universe resembles a large and well-regulated Family, in which all the officers and servants, and even the domestic animals, are subservient to each other in a proper subordination; each enjoys the privileges and perquisites peculiar to his place, and at the same time contributes by that just subordination, to the magnificence and happiness of the whole.[37]

The values of such a society had to do with connection, obligation, loyalty, privileges, duty, submission and honour rather than with the individual, rights, equality, fairness, or contract. They were, in short, aristocratic values.[38] The intellectual framework that legitimated the institution of the monarchy legitimated an entire social order of subordination as well. Monarchy and aristocracy were two faces of one coin. Religion, the third element in Clark's depiction of English society, underpinned and legitimated both.

This was a personal, or "face-to-face" society, as Peter Laslett termed it. If everyone was born to a place in society and most kept to that place, each person was woven into a web

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[36]Clark, English Society, p. 74.

[37]Soame Jenyns, A Free Inquiry into the Nature and Origin of Evil (London, 1757), quoted in Clark, English Society, p. 75.

[38]Clark's discussion of the aristocratic values expressed in gaming and duelling highlights the importance of honour as a boundary marker for the elite. Clark, English Society, pp. 106-118.

of relationships, a network of deference and obligation. The King's ministers maintained their hold on power through the careful disposition of places and pensions to their friends and supporters. Their friends and supporters remained their friends and supporters in part because of their ability to dispense patronage, but also because of long-standing personal or family loyalties. Elections were managed by judicious pressure applied to the network of dependence and obligation. But patronage was much more than a quid pro quo economic arrangement to maintain power. It permeated every level of society and every type of relationship. This was a society based on favours asked and favours done. Whether it was the appointment of a minister or curate to a parish, the securing of a pension for a worthy widow, or even the transmission of letters or valuables, it was all done personally. This is well illustrated by a letter written by Robert Prescott in 1787 from his home at Harpenden to a friend in London, Colonel Etherington:

> Yours directed to me but addressed to my wife is this instant received. We have many thanks to you but no Rum is arrived, I hope you sent it to the Windmill, St John Street near Smithfield, as that Waggon comes by the door, for if by any other, that only passes thro' St Albans, it may be long before we hear of it - however of this you can let me know - You make us both happy in the expectation of seeing you, you are certain of a hearty & sincere welcome. By the bye I have plenty of room for your horses, if you ride. Will you contrive to send a barrel of oysters by the Waggon from the Windmill, St John Street, on Friday the 16th of this month, it sets out on that day by twelve o'clock at Noon and we shall get them Saturday morning at eight.
>
> I have a favour to ask from you for which I shall be obliged, as well as my sweet girl, she has had a present from a Great Aunt of her watch and a ring, which has been sent from Wakefield by Mr John Brook, St Bennets hill, St Paul's Churchyard. It is directed for Miss Prescott pray bring it with you. Mr Brook is one of the Heralds.
>
> Thank you for the Newfoundland dog, he will preserve our Poultry at night, they came after them the other night, but did not succeed. This is a very rainy day here, which has an effect on all Englishmen, added to my wife keeping me up last night, later than usual, talking nonsense. All here

> join in best compliments to you, believe with truth Always yours Robt Prescott[39]

One sent gifts and received them. One asked favours and expected to have them done. In 1780 Charles Jenkinson asked General James Murray, then commanding in Minorca, to send him some Minorca honey by the returning fleet and to arrange for some friend to send him more on an ongoing basis, as his physician had ordered him to eat honey instead of butter for his breakfast.[40]

Behaviour that today would be condemned as corruption was considered courtesy and obligation in the eighteenth century. James Murray, writing to his patron, the Duke of Newcastle, to thank him for a promotion, sent him furs to line his coat:

> I cannot however delay offering my most grateful thanks for the kind Offices you have done me with His Majesty as I am a meer Soldier of Fortune, I am persuaded the promotion I have got must be the Effects of your recommendation, Be Assured My Lord I shall do every thing in my power to deserve the continuance of your Protection: were my abilities equal to my Zeal you would have no reason to be ashamed of having taken me by the hand. As I imagine you will not dislike a Coat lined with the furs of Canada, I have sent some of the best I could get for that purpose to you by Major Maitland, the acceptance of which will do me much honor. Be assured of my sincere attachment to your Grace, & that with the utmost Truth and Esteem I have the Honor to be
> My Lord
> Your Graces most faithfull & most obedient humble Servant[41]

This letter shows another aspect of the network of obligation. Murray felt obliged to perform his duties well in order to reflect well on his patron. But perhaps the most striking example of gift-giving I have encountered was a letter written by Murray from

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[39]Robert Prescott to Colonel Etherington, 8 November 1787, Bodleian Library, MSS English Letters c.225, f. 138.

[40]C. Jenkinson to Lt. General Murray, 24 December 1780, British Library, Add. MSS. 38308, f. 29.

[41]James Murray to the Duke of Newcastle, 25 May 1760, British Library, Add. MSS. 32906, ff. 259, 260.

Quebec to William Pitt in 1761. Pitt was Murray's other patron and it was appropriate that he should send him a token of his esteem. The token he chose to send was unusual:

> a true Indian Boy dress'd in the fashion of his own country: I hope such a curiosity will prove agreeable to Lady Esther or yourself: He has lived with me near two years, appears to be of a very mild disposition, and is remarkably quick and docile: He never had the smallpox; it proves often fatal to his Nation which is that of the Panis, and I imagine it will be proper to inoculate him.[42]

No further comment was made; in the next paragraph, Murray asked that Lady Esther send any particular designs she might like embroidered on a bark working basket that he intended commissioning the nuns of Quebec to make for her.

This was all a part of the process of administration. One asked favours and dispensed them. Murray enclosed a draft of the survey of Canada in his letter, and a copy of the report on the Revenues of Canada that he had sent to the Duke of Newcastle. He then ventured to ask that his Secretary, Captain Hector Theophilus Cramahé, who had retired from the Army, be continued as Secretary in the civilian government or that he be given another Place.[43] Even Pitt, now Lord Chatham, wrote in supplicatory phrases to General Guy Carleton when he sought an ensigncy for his sixteen-year-old son, Lord Pitt.[44] That all but the most personal of letters were signed, "Your most humble and obedient servant." fits very well with a society where obligation and dependence was the rule.

In the economic realm, the network of personal obligation became the network of credit and its web covered the old world and the new, stretching to the Indian subcontinent and to the farther reaches of North America. In this far-flung network, credit was necessarily long and payment slow. It might ordinarily take years for a London merchant

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[42]James Murray to William Pitt, 13 May 1761, PRO 30/8/50, ff. 173-178.

[43]Ibid.

[44]Guy Carleton to Chatham, 25 October 1773, PRO 30/8/25, ff. 210, 211; Chatham to Guy Carleton, 28 March 1774, PRO 30/8/6, ff. 19-20; T. Grenville to Countess of Chatham, 20 March 1774, PRO 30/8/35, f. 130.

to realize the profit on goods advanced in the fur trade. But John Brewer has pointed out how the London artisan, a tailor or bootmaker perhaps, dependent on his noble patron, was also forced to wait for his payment. He, in turn, relied on credit to supply his needs, both business and personal, until payment was received.[45] Even the army was vulnerable. In 1765, General Gage was not able to procure money to pay the British army in North America because the bills of exchange of the government contractor who was to supply the funds had been protested in London.[46]

While the network of credit was both part of, and a reflection of, the larger network of societal relations, it was also the entry point for a transformation of those relations. In its purest form the hierarchical model is feudal in nature. All social relations are encompassed under customary duties and obligations. Commerce introduces another element, the sale of goods and services for money. Because all were enmeshed in the network of credit, personal character and reputation were crucial to continued survival. This is one place where the values of the old model and the new coincided. Changed by its passage perhaps, the aristocratic value of honour was carried over into the mercantile world. It is not until the triumph of capitalism that social relationships are completely transformed, transformed from relations of personal dependency to impersonal relations mediated by things such as money and bureaucracy – the hallmark of a modern society.

As mentioned above, Quebec after the Conquest in 1760 was a society beginning such a transformation. It is possible to look at eighteenth-century society through a golden haze of nostalgia and see it as somehow better, warmer, nicer than the modern cold, fragmented, alienated society – the world we have lost. Surely this is no more useful than the depiction of the transformation of social relations as the result of the unceasing march

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[45]John Brewer, "Clubs, commercialization and politics", in Neil McKendrick, John Brewer and J.H. Plumb, The birth of a consumer society: The commercialization of eighteenth-century England (London: Europa, 1982), pp. 231-262.

[46]James Robinson to Charles Jenkinson, 10 July 1765, British Library, Add. MSS. 38204, ff. 304, 305.

of progress. The underlying purpose of the network of paternalism, patronage, deference and obligation must be kept in mind. It was to maintain the hegemony of the elite. E.P.Thompson was concerned to point out that the relations of power were merely masked by the rituals of paternalism and deference.[47] I would like to take this argument one step farther. The rituals of paternalism and deference were part of a certain system for maintaining relations of power. The goal of the Governors in the colony of Quebec was stability – that is, they sought to maintain their control over the colonists, both Canadiens and English-speaking merchants. They used the rituals of paternalism and deference as part of a technique of control, a technique that they were not wholly conscious of using, but a technique, nonetheless. The particularities of the colony forced modifications in their methods but they never lost sight of their overall goal. As Thompson points out:

> The gentry had four major resources of control- a system of influence and preferment;...the majesty and terror of law; the local exercise of favours and charity; and the symbolism of their hegemony. This was, at times, a delicate social equilibrium, in which the rulers were forced to make concessions. Hence, the contest for symbolic authority may be seen, not as a way of acting out ulterior "real" contests but as a real contest in its own right.[48]

It would also be a mistake to say that the transformation from the older form of social relations to the new was effected by capitalism, because that would imply that capitalism was somehow outside of the social relationships – it is not. Rather, it is a distinctively modern form of social relationship.[49] However, capitalism and the modern state are

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[47] E.P.Thompson, Customs in Common, p. 7.

[48] Thompson, "Patricians and Plebs," p. 74.

[49] "Capitalism lies, in E.P.Thompson's felicitous phrase, at the centre of a 'nexus of relationship', a societal tapestry in which 'social and cultural phenomena do not trail after the economic at some remote remove' but are constitutive of what 'the economic' is (1965: 84). Bound up with capitalism are novel and distinct forms of sociation, and embedded in these are new kinds of individual subjectivity." Derek Sayer, Capitalism and Modernity: an Excursus on Marx and Weber (London: Routledge, 1991), pp. 2, 56.

inextricably interwoven; the social relations of a kingdom do not work within a capitalist system.

The conservative eighteenth-century understanding of society as religious, aristocratic and monarchical was both gradually eroded by various developments and intentionally challenged by new players. In England, the growing fiscal needs of a state engaged in almost constant warfare throughout the century resulted in increased efficiency and professionalization in revenue collection.[50] The desire for increased revenues had led landowners to challenge customary tenures in order to permit agricultural "improvement." This process continued into the eighteenth century with significant effects on customary relations between landowners and their tenants. More direct challenges to the old order can be seen in the associations that were so common in the period – from the Association movement, the Society of the Supporters of the Bill of Rights and the Masonic lodges to the box clubs that sprang up at local alehouses.

I do not mean by this argument to reify the new model of social relations into a thinking, intending entity. It is, in fact, the pattern of changes and challenges that constitutes the new model rather than the new model causing the challenges to the old.[51] Eventually the model of the subject of the King gave way to the model of the citizen in the state. Political power came to be understood as incarnated in the apparatus of the state rather than in the person of the King. Other relationships within the society changed as well. Relations of personal dependency were largely replaced by relations

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[50]John Brewer, The Sinews of Power: War, Money and the English State, 1688-1783 (London: Unwin Hyman, 1989).

[51]I here follow Foucault's analysis of power: "Power must be understood as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them; as the support which these force relations find in one another,... as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies." Michel Foucault, The History of Sexuality, Volume I: An Introduction, translated by Robert Hurley, (New York: Vintage Books, 1980; originally published as La Volenté de savoir, Paris: Éditions Gallimard, 1976), p. 92.

mediated by bureaucracy, law and money.[52] The transformation was neither sudden nor complete. Although the newer concept of individual independence eventually won out, both it and the older concept of personal dependency held sway in the middle years of the eighteenth century. The competing models often resulted in conflict.

The transformation from kingdom to state can be examined fruitfully in Quebec for a number of reasons, the first of which is that the colonial administration, both in London and in the persons of the governors themselves, set out to provide the institutions and structures they regarded as necessary to make the colony a British colony. Its constitution was to be the very image and transcript of the British constitution. Of course, they soon found themselves in difficulty since the particular situation of Quebec did not permit the simple erection of British institutions.

It became clear that changes would have to be made to suit the situation. But the changes were not determined by the situation alone. Administrators made choices between alternative solutions to the various problems that they faced. They did so on the basis of values and assumptions that they themselves may not always have been able to articulate. The pattern of the choices they made can, nonetheless, give insight into the nature of those ideas. The measures taken, the conflicts that ensued, and the ways various problems were resolved reveal much about eighteenth-century British ideas about the nature of the state and the appropriate means of legitimating its rule.

Because, at the time of the conquest, the French colony was more feudal than Britain, the change of government raised issues in Quebec in a very clear way that were obscured by

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[52]"Political power becomes incarnated in an apparatus rather than being embodied in persons (the conception of a 'body politic', originally a metaphorical extension of the body of the King, provides a bridge from one to the other). It is abstracted from individual subjectivities and enshrined in an objective 'machine'. The norms of earlier governance - tax farming, evergetism and the like - would be viewed, in this modern world, as corruption: the systematic and morally unacceptable 'confusion' of private and public interests." Sayer, p. 78.

the more gradual process of transformation in Britain itself. The term, feudal, ought not to be regarded as holding a pejorative meaning – it is not a synonym for backward or unprogressive, as it has been often used in criticisms of Quebec. It is used here in the technical sense; land was held in Quebec by feudal tenure.[53] The social organisation of the colony was predicated on this fact. By contrast, although land continued to be the most important form of wealth in Britain, it was so because of the profits which commercial agriculture could produce. Britain was becoming a commercial society. British social and political organization, formerly based on feudal tenure, was changing to reflect this new economic basis. The governors of the newly British colony, Guy Carleton in particular, have been castigated for their autocratic and aristocratic natures, as though these were personal failings that unduly influenced the policies they promoted.[54] They might be better understood as caught between the older forms of political and social organization that they were trying to replicate in the colony and the new challenges posed by the changing world. Many of the problems so often remarked upon in the histories of their administration resulted from this conflict.

The tensions which eventuated in the making of the modern state can be examined in Quebec after 1760 for a very simple and practical reason – the wealth of documentation produced by the need to keep the metropolis informed. Because colonial governors lacked the authority to act alone, all major decisions and many minor ones were directed from London. The governors were to govern the colony in accordance with the statutes passed for it in the Parliament of Great Britain, in accordance with the Royal Commissions by which the governors were authorised to act and in accordance with the Royal Instructions drafted by cabinet for them. The Board of Trade and Plantations, the Secretaries of State, the Cabinet and the King himself relied on the reports written by the governors. Merchants in the colony used agents in London as well as their partners and

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[53]Roberta Hamilton, "Feudal Society and Colonization," in Canadian Papers in Rural History VI, edited by Donald Akenson, (Gananoque, Ontario: Langdale Press, 1988).

[54]Burt, Quebec, p. 154; "James Murray," Dictionary of Canadian Biography, pp. 577-578.

suppliers there to make their concerns and desires known in the metropolis.[55] The result was countless folios of correspondence, reports, Instructions, Commissions, petitions and other material now preserved in the Public Record Office, the British Library and the National Archives of Canada.

These three factors – Britain's clear intention to create a state in its own image, the nature of the society of New France, and the wealth of documentation produced by the colonial situation – make Quebec after 1760 a good opportunity to study the making of the modern state. Of course, Quebec cannot be regarded as a type or model of some ideal process of modernization but as a particular historical situation with particular problems, possibilities and personalities that interacted in a particular way to create a modern state.

Even under the military regime that existed until 1764, the three military governors of Quebec, Trois Rivières and Montreal were instructed to treat the French inhabitants gently, to retain as many of them as possible. Lord Egremont, the Secretary of State wrote to Jeffrey Amherst, the Commander in Chief, instructing him to:

> recommend it strongly to them [the governors] to employ the most vigilant attention and take the most effectual care that the French inhabitants . . . be humanely and kindly treated, and that they do enjoy the full benefit of that indulgent and benign government which already characterizes His Majesty's auspicious reign and constitutes the peculiar happiness of all who are subjects to the British Empire.[56]

There was no doubt in the minds of the elite that a taste of British government would be sufficient to win the loyalty of the new subjects, provided they were not mistreated. Amherst was further instructed to see that the governors:

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[55] For a discussion of colonial agents and their influence on colonial policy see M.G.Kammen, A Rope of Sand: The Colonial Agents, British Politics and the American Revolution, (Ithaca, New York: Cornell University Press, 1968) and J.M.Sosin, Agents and Merchants: British Colonial Policy and the American Revolution, 1763-1775, (Lincoln, Nebraska, 1965).

[56] Egremont to Jeffrey Amherst, 12 December 1761, Haldimand Papers, cited in Burt, Quebec, p. 30.

> give the strictest orders to prevent all soldiers, mariners and others . . . from insulting or reviling any of the French inhabitants, now their fellow subjects, either by ungenerous insinuation of that inferiority which the fate of war has decided, or by harsh or provoking observations on their language, dress, manners, customs, or country, or by uncharitable reflections on the errors of that mistaken religion which they unhappily profess.[57]

The patronizing tone of this instruction does not completely obscure its intention, which was that the French inhabitants were to be made into good subjects of the King by gentle, humane treatment. The instruction also raises the subject of relations between the military and the civilian population. As will be seen in what follows, this was one area where the legitimacy of the governors' authority and of the institutions of civil administration were tested to the breaking point in the years after 1764.

According to eighteenth-century views, property was essential to the citizen; otherwise one was merely a subject.[58] Articulated explicitly by Locke, this was commonplace knowledge among colonial administrators and those who sought their rights as citizens. Eighteenth-century theorists, lawyers, merchants and governors were also quite clear that the bulwark of property was the law. It was, perhaps, the most important site of the transformation to the modern state. The courts occupied a great deal of the time and attention of the colonial governors in the early years of the British administration. The governors wanted a system that would meet the needs of the Canadiens with as little disruption as possible. The merchants of Quebec and Montreal were also very interested in the establishment of a legal system. They wanted consistency and the predictability of

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[57]Ibid.

[58] See Paul Langford, Public Life and the Propertied Englishman, especially chapter 1, "The Propertied Mind," pp. 1-58. "This veneration [for the past] involved certain assumptions about the theory and place of politics, which, however determinedly challenged, were not superseded until much later. One of these assumptions was a hierarchical concept of civil rights and duties, rendering most Englishmen the pawns of their social superiors, bestowing severely limited responsibilities in a parochial setting on men of modest means, and reserving a full part in the business of government and legislation to a narrow elite. With this assumption went another, whose attractions were positively enhanced by the defeat of divine right monarchy in 1688, and which made property the sole, rightful basis of authority. Preface, v.

outcomes, which they believed could only be gained under English law. They were averse to a system in which legal decisions differed from case to case. Predictability is, of course, necessary for the successful prosecution of business, but it also represents the shift from a kingdom where almost all relations were personal and direct to a modern one where many relations are impersonal and mediated by law and contract.

Three aspects of the law are significant here; the first and perhaps the more important is the institutional structure developed for the administration of justice in the colony. The second aspect of the law is the set of ordinances passed in the colony and ratified by the King in Council, together with the procedures followed to ensure their legitimacy. These ordinances represent what the colonial administrators thought was necessary to provide a structure for the society. The various challenges to this administrative structure reveal the tensions inherent in the unique situation of the colony of Quebec. Its reformation by imperial statute shows the changing ideas at the metropole, ideas changed in part by the experience of administering Quebec. The third was the ongoing debate regarding civil law in the colony – was English civil law to be introduced or not?

The crucial importance of the Church in legitimating the state was obvious to these colonial administrators; they could not imagine a secular state. As J.G.A. Pocock argues: "If there was one thing which civil war and the dissolution of government had etched in letters of fire and blood on the English historical memory, it was that the unity of king and parliament must at all costs be maintained, and that this necessitated the maintenance of a national church under royal and parliamentary authority."[59] But Quebec posed an enormous challenge – how to build a state when the majority of the population adhered not to the Church of which the King was Head, but to the Catholic Church, a potent symbol of extra-national power. The constitution of Britain in the eighteenth century was predicated on the Revolution Settlement, on the exclusion of Catholics from public

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[59] Pocock, p. 257.

office. The vast majority of the inhabitants of the colony were thereby excluded from participation as jurors, as lawyers, as Justices of the Peace or as Council members. This was of far greater significance than the fact that they spoke French rather than English. The Governors themselves spoke and wrote French fluently; Governor Haldimand, Swiss by birth, preferred French to English for correspondence. The constitutional problem was religious rather than linguistic in nature.

Overall, the issue was legitimacy. How did the state, in this case, the colonial administration of Quebec, establish itself as legitimate? If we understand legitimacy to be not just the means for securing the obedience of subjects or citizens but also the means for securing their assent that such obedience is right and proper, it is clear that legitimacy was not external to the institutions established. Subjects were not merely duped into acquiescing in their subjection by cynical administrators. In fact, the Canadiens were not the only audience for the process of legitimation – the administrators themselves needed to believe that the institutions they established were right and proper. The problems with both the military and the merchants indicate that they, too, were in need of persuasion of the legitimacy of the civil authority.

Chapter One - George III by the Grace of God, King

The first step in the establishment of the civil administration was to proclaim the authority of the Governor. On him the whole civil administration rested. On 21 November 1763 a Royal Commission making James Murray Captain General and Governor-in-Chief of the Province of Quebec was issued. It did not reach Murray until the following summer, though news of his appointment had preceded it. When he received the Commission, he sent copies to Montreal and Trois Rivières along with instructions that it be proclaimed in those two places in like manner to its proclamation in Quebec.

> A Copy of my Commission together with the Several extracts from my instructions I have the honor to send to you that the commission may be published at Trois Rivières as is directed by said instructions. The Troops shall be under arms and the cannon fired here upon this occasion I do suppose you will judge it right to do the same at Trois Rivières.[1]

In this way, Murray directed the ritual drama to be enacted in Trois Rivières and Montreal, the only other towns of any consequence in the colony, as well as in Quebec itself. Rituals form part of the rhetoric of legitimacy. We are accustomed to think of rhetoric as empty, as lacking in real content. But rhetoric is speech which is intended to do something; in this case the rhetoric of ritual is meant to establish the legitimacy of the Governor's rule. E.P. Thompson has argued that the eighteenth-century British elite and the poor communicated with one another through ritual. He called it "participatory theatre."[2] It could also be viewed as what Walter Bagehot once termed it – the dignified part of the constitution. The legitimacy of the Governor is enhanced by the ritual of his proclamation.

According to the account published by the newly established Quebec Gazette, the proclamation took place in Quebec on 10 August 1764:

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[1] 7 August 1764, James Murray to Frederick Haldimand, Haldimand Papers, British Library, Add. MSS. 21666, f. 175.

[2] E.P.Thompson, "Patricians and Plebs", pp. 46-48, 68-71.

> His Majesty's Letters Patent, constituting and appointing the Honorable JAMES MURRAY, Esq; CAPTAIN GENERAL AND GOVERNOR IN CHIEF in and over His Majesty's Province of *Quebec*, and VICE ADMIRAL of the same, were read to a numerous Concourse of People, in the Square fronting His Majesty's Castle of St. Lewis, where the Troops were drawn up under Arms; after which the Cannon from the Ramparts was fired, and answered by the Men of War in this Harbour, and by Volleys of small Arms from the Regiments in Garrison here – And the Day concluded with the usual Demonstrations of Joy and universal Satisfaction.[3]

The same account was given in French in the opposite column of the paper. This was more than merely making known the fact that James Murray had been appointed Governor. The setting was significant. The proclamation took place in the square in front of the Chateau St. Louis, now significantly termed His Majesty's Castle of St. Lewis. We no longer live in a time where castles function to any great extent so the significance of this may easily be missed. In the eighteenth century, however, a castle was, first and foremost, a weapon of war. Control of a castle meant control of the countryside. This castle now belonged to the King of Great Britain rather than the King of France. The troops drawn up under arms, the firing of cannon from both the ramparts and the ships of war in the harbour, the volleys of small arms from the garrison, all combined to demonstrate the force at his disposal. One might think that its purpose was to intimidate the newly conquered Canadiens. That was part of its purpose, though eighteenth-century men would have said that it was to imbue them with a proper sense of obedience and respect. However, this demonstration had another level of meaning. Quebec had been conquered by force of arms; the significance given to this fact was that the arbitration of Providence, "the fate of war," had given the colony to the conquering King.[4] The force of arms was hallowed and legitimated by the doctrine of the Providential divine right of kings. Heaven had given its blessing to the conquest of Quebec. The Canadiens were now His Majesty's new subjects, to use the expression invariably used by the Governors to refer to them. And Governor James Murray was the King's representative in the colony.

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[3]Quebec Gazette, 16 August 1764.

[4]Egremont to Jeffrey Amherst, 12 December 1761, Haldimand Papers, cited in Burt, Quebec, p. 30.

The Gazette account concludes with the words: "And the Day concluded with the usual Demonstrations of Joy and universal Satisfaction." One might have expected that such a show of force would be greeted with sullen indifference by the Canadiens. Perhaps it was. The phrase, "joy and universal satisfaction," is ritualistic and in a time when few independent means of learning about such an event existed, the positive report of the reception of the proclamation was itself part of the ritual of legitimation. Although the Gazette was published in both English and French, the poor quality of the French translations alone would reveal its identity as the product of the English minority. But the display of force when clothed with formality and ritual may in fact have been understood only to add dignity and excitement to the occasion and might therefore have been received with expressions of joy and satisfaction.

Although the proclamation of James Murray as Governor was the first step towards establishing civil government to occur in Quebec, the process had begun long before in London. It was initiated by Charles, Earl of Egremont, one of His Majesty's Principal Secretaries of State, in a letter to the Lords of Trade 5 May 1763.[5] He instructed their Lordships to take into consideration the Cessions made in the Treaty of Paris and to report their opinion:

> By what Regulations, the most extensive Commercial Advantages may be derived from those Cessions, and How those Advantages may be rendered most permanent & secure to His Majesty's Trading Subjects.[6]

Here the primary consideration with respect to the colonies is articulated – what commercial advantages could they be made to yield? All else depended on this great principle. Their reply was that the most obvious advantage to accrue to Britain was the exclusive fishery of the St. Lawrence. The second benefit was the fur and skin trade of all the Indians in North America and the third, supplying all the Indians of North America

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[5]Egremont was brother-in-law to George Grenville, who as first Lord of the Treasury and Chancellor of the Exchequer headed the administration at this time.

[6]Adam Shortt and Arthur G. Doughty, Documents relating to the Constitutional History of Canada, 1759-1791 (Ottawa: 1907), p. 94.

with European goods directly through the hands of English traders.[7] A lengthy memorandum authored by Lord Grosvenor in 1763 (now filed among the Liverpool Papers) put it thus:

> The advantages which Great Britain derives from Colonys are: supplying herself with rough Materials for her Manufactures, or Articles of Commerce to be exported to other Countrys; Employing her Shipping in the transportation of those rough Materials, or Articles of Commerce and the Consumption of her Manufactures by the Colonists...
>
> Furrs and Peltry are the Native Products of Canada, and nothing is wanting to secure the importation of large quantities of those articles from thence, as well for the present, as in perpetuity, but the settling a suitable Tariff between our Traders and the Indians, and prohibiting our own People from Hunting. The Indians are sensible that on the preservation of the Game, depends their own Existence, and are therefore carefull neither to Hunt, or to kill the young, at improper Season. Our people consider the present profit only, and so they can increase that, have no regard to the Extinction of the Game.[8]

The comment regarding the conservationist policies of the Indians is an interesting sidelight, but the general attitude is congruent with that expressed by Egremont, presumably on behalf of the Privy Council.

The Lords of Trade were further instructed to consider the following three questions:

> 1st What New Governments should be established & what Form should be adopted for such new Governments? and where the Capital, or Residence of each Governor should be fixed?
>
> 2dly What military Establishment will be sufficient? What new Forts should be erected? and which if any, may it be expedient to demolish?
>
> 3dly In what Mode least Burthensome and most palatable to the Colonies can they contribute towards the Support of the Additional Expence,

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[7]Shortt and Doughty, p. 100.

[8]Lord Grosvenor, Memorandum, Hints respecting our Acquisitions in America, 2 February 1763, British Library, Liverpool Papers, Add. MSS. 38335, ff. 1-5.

> which must attend their Civil & Military Establishment, upon the Arrangement which Your Lordships shall propose?[9]

In their consideration of the first of these questions, the Lords of Trade were instructed to examine what privileges the inhabitants of Quebec and Montreal had been conceded by the terms of the Capitulations of those towns. It was also suggested to them that they consider the expedience of retaining, to some extent anyway, the form of government that had been established in the colony prior to its conquest. Quebec was not, therefore, considered to be a blank slate upon which the conqueror could write whatever he wished. The first consideration was to be the restrictions created by the Capitulations. These were to be regarded as treaties, guaranteeing certain privileges in return for surrender. They were regarded as binding.

Sir Lewis Namier regarded the attention paid to legal arguments in eighteenth-century politics as pernicious. "In the eighteenth century Parliamentary politics were transacted, to a disastrous extent, in terms of jurisprudence. When the repeal of the Stamp Act came before Parliament much attention was paid to abstract rights, and the discussion consequently turned at least as much on legal rules and precedents as on policy."[10] However, when the task attempted is the creation of legitimacy, the attention paid to legal arguments is itself part of policy.

The second consideration was to be expediency. Here the Secretary of State and the Privy Councillors showed themselves to be practical men. Regard was given to what would work in the colony. The reports of the military governors, James Murray in Quebec, Thomas Gage in Montreal and Ralph Burton in Trois Rivières, were included with these instructions to give the Lords of Trade as much information as possible upon which to base their recommendations. In Murray's report of 5 June 1762, he gave a succinct description of the four "Classes" of Canadiens, as he termed them and his opinion as to what their reaction to the change in government would be. He reported the

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[9]Shortt and Doughty, p. 94.

[10]Lewis Namier, The Structure of Politics at the Accession of George III (London: Macmillan & Co., Ltd., 1957), p. 42.

first Class, the gentry, to be "extremely vain" though poor, to be contemptuous of trade though they would engage in it if opportunity offered, and to be "great Tyrants" to their vassals. This group, he felt, would not "relish the British Government from which they neither can expect the same Employments or the same Douceurs, they enjoyed under the French."[11]

The second group discussed by Murray were the Clergy. "Most of the dignified of them are french, the rest Canadians and are in general of the lower class of People." The former, he thought, would have great difficulty accommodating themselves to the change in government, but he suggested that they would "drop off by Degrees." He did not consider the Canadian priests very clever but thought that once the clergy was entirely composed of Canadians, "they would soon become easy and satisfied." He suggested that the appointment to specific parishes, hitherto the province of the bishop, should be taken over by the King or by those who acted under his authority, "for the sake of keeping them in proper subjection."[12] No great respect for the Church or the clergy is in evidence here; instead the intent is to ensure that the religious authority is subordinate to the secular.

The third group or Class described by Murray was composed of Traders. The wholesalers were largely French, the retailers largely Canadian, he said, and all of them were "deeply concerned in the Letters of Exchange." He predicted that few of those who had any funds in France would remain in the colony.[13] "The fourth Order is that of the Peasantry, these are a strong, healthy Race, plain in their Dress, virtuous in their Morals, and temperate in their Living." Murray regarded them as having been kept extremely ignorant under the previous regime, which had done its best to persuade them that "the English were worse than Brutes, and that if they prevailed, the Canadians would be ruled

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[11]James Murray, Report of the State of Quebec, 5 June 1762. British Library, King's MSS. 205, ff. 98-101.

[12]Ibid.

[13]Ibid.

with a Rod of Iron and be exposed to every Outrage." Murray asserted that they had instead been treated so well under military rule that they only feared being forced to leave as the Acadians had been. "Convinced that this is not to be the case, and that the free exercise of their Religion will be continued to them, the People will soon become faithful and good subjects to His Majesty."[14] According to this report, therefore, Murray was quite confident that once they had experienced the benefits of British government, the Canadiens would be content.

One might well wonder what became of the Indians. They do not appear in Murray's list of the inhabitants of the colony. This omission is significant. The Indians were considered external to the civil administration of the colony. They were treated as allies rather than subjects.

To return to the questions posed by the Secretary of State: Appended to the first question was a secondary one that seems almost trivial, "Where the Capital, or Residence of the each Governor should be fixed?" It does provide, however, a hint of something that will become clearer – the crucial importance of the Governor in the administration of the colony. As the King's representative, he was the most important part of the government; he was personally entrusted with the task of the erection of civil government. The Commission and Instructions to the Governor formed the constitution of the colonial government.

The report prepared for Egremont by the Lords of Trade noted that the new government of Canada contained and would likely continue to contain a great many more French inhabitants than British. Therefore, they argued, the chief objects of any new form of government to be established there should be, "to secure the ancient Inhabitants in all the Titles, Rights and Privileges granted to them by Treaty and to increase as much as possible the Number of British and other new Protestant Settlers."[15]

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[14]Ibid.

[15]Shortt and Doughty, p. 104.

This will hardly be news to any student of Canadian history, but it should be noted that the concern was to increase the number of Protestant settlers. The problem with the Canadiens was that they were Catholic, not that they were French-speaking. The Lords recommended that a Governor and Council be appointed under the King's immediate Commission and Instructions.

In further explanation of the question regarding the military establishment, the Lords of Trade were directed to two objects: the security of the North American colonies against any European power and "the Preservation of internal Peace & Tranquillity of the Country against any Indian Disturbances." The latter was seen to be the more immediate threat. In expansion upon this point, Egremont wrote that although it might be necessary to erect some forts in Indian country (to use force or at least the threat of force to discourage attacks by the Indians), a policy of conciliation was to be preferred:

> by protecting their Persons & Property & securing to them all the Possessions, Rights and Priviledges they have hitherto enjoyed, & are entitled to, most cautiously guarding against any Invasion or Occupation of their Hunting Lands, the Possession of which is to be acquired by fair Purchase only.[16]

The concern was certainly to avoid provoking a dangerous enemy, but the wording reveals an acknowledgement of Indian rights, particularly the right of possession of their hunting grounds. The Grosvenor memorandum cited above also touched on this subject:

> The vast intermediate Tract of Country...I should wish to see reserved to the Indians, and every white person restrain'd from killing game beyond the Limits prescribed the Settler. The Indians can subsist only by Hunting, and it is the employment in which they are most usefull to us...besides by preserving the Game for the Indians, it wou'd continue an inheritance to them for many generations to come, perhaps for ever, and they by that means be prevented from becoming burthensome to us.
>
> Such an Instance of our good will to the Indians, wou'd fix them more firmly in our Interest, than all the Talks we can give them, or all the presents we can bestow on them; they are a free People, and jealous of their Liberty; they therefore are most attentive to such parts of our

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[16]Shortt and Doughty, p. 95.

> conduct towards them as express designs to take away their Independency.[17]

The policy of conciliation towards the Indians was the subject of further consideration when the question of the proper boundary for the colony of Canada was discussed in the report prepared by the Lords of Trade at Egremont's direction. The Lords of Trade first proposed a circumscribed colony with all the western territory reserved as Indian Lands. This restriction of the colony of Canada, they argued, would prevent both the Canadiens and others from settling in remote areas, "where they neither could be so conveniently made amenable to the Jurisdiction of any Colony nor made subservient to the Interest of the Trade & Commerce of this Kingdom by an easy Communication with & Vicinity to the great River St Lawrence."[18] Colonies were, first and foremost, for the purpose of the trade and commerce of Great Britain. Egremont responded on behalf of the King (and the Privy Council) that leaving such a large tract of land outside the "Civil Jurisdiction of some Governor, in Virtue of His Majesty's Commission, under the Great Seal of Great Britain," might allow another European power to take possession of it as derelict lands.[19] The Lords of Trade replied with a series of objections to this plan. First, they were concerned that if the country were annexed to Canada, it could later be argued that the King's title to it was derived solely from the cessions made by France in the Treaty of Paris. His Majesty's title to the lakes and surrounding territory rested on a more solid and equitable foundation than that, they argued. They deemed it particularly necessary that "just Impressions on this subject should be carefully preserved in the Minds of the Indians, whose Ideas might be blended and confounded," should they consider themselves under the Government of Canada. The Indians were yet another intended audience for the process of legitimation.

Secondly, they were apprehensive that such an arrangement would give Canada too great an advantage in the Indian Trade to the detriment of the other colonies. Here the Privy

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[17]Lord Grosvenor, Memorandum, Hints respecting the Settlement of our American Provinces, 2 February 1763, British Library, Liverpool Papers, Add. MSS. 38335, ff. 14-18.

[18]Shortt and Doughty, p. 103.

[19]Shortt and Doughty, p. 108.

Councillors had an eye to the likely response of the colonists to the south and their mercantile connections in London. Their third objection to the plan was that control over the Indian Trade could only be achieved by posting the greatest part of the American troops in the posts and forts of that country, and that this would make the Governor of Canada the virtual Commander in Chief of the Forces in America. They proposed instead that a Commission, under the Great Seal of Great Britain, for the Government of the territory be given to the Commander in Chief of His Majesty's Troops. They urged that a proclamation be issued immediately prohibiting all settlement in that territory and reserving it for the hunting grounds of "Indian Nations Subjects of [His] Majesty" and for the free trade of all of the King's subjects.[20] Settlement was to be directed instead to Nova Scotia and East and West Florida and to be encouraged by grants of land to retired soldiers and officers, reduced or disbanded in America.

It is clear that the first consideration for the Lords of Trade was the establishment of royal sovereignty over the land in question. Indian rights were acknowledged but only in order to reduce the risk of Indian unrest which would be dangerous and expensive. They were then concerned to placate the colonies to the south of Canada – a measure that gave the advantage in trade to the newly acquired subjects over the heads of the old subjects would be protested vehemently indeed. Finally, they were concerned to prevent jurisdictional disputes.

The proposals of the Lords of Trade were accepted by the King and Privy Council and incorporated in the Royal Proclamation of 1763.[21] After setting out the boundaries of the four new governments to be erected, Quebec, East and West Florida and Grenada, the proclamation directed the Governors to summon Assemblies as soon as circumstances permitted and empowered the Governors together with their Councils and these

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[20]Shortt and Doughty, p. 111.

[21] Peter D. Marshall, "The Incorporation of Quebec in the British Empire, 1763-1774," in Of Mother Country and Plantations: Proceedings of the Twenty-Seventh Conference on Early American History, edited by Virginia Bever Platt and David Curtis Skaggs, (Bowling Green: Bowling Green State University Press, 1971).

representatives of the people to make laws and ordinances for the government of the colonies. The reason for this aspect of the proclamation was made clear:

> And whereas it will greatly contribute to the speedy settling of our said new Governments, that our loving subjects should be informed of our Paternal care, for the security of the Liberties and Properties of those who are and shall become Inhabitants thereof.[22]

The colonies had to be made attractive to colonists for settlement to proceed. Until such Assemblies could be called, residents of the colonies were to enjoy the benefit of the laws of England and to this end the Governors had been given the power, under the Great Seal, to create Courts of Judicature within the colonies to hear and determine all cases, "according to Law and Equity, as near as may be agreeable to the Laws of England." Appeal from the decisions of these courts was to be to the Privy Council. English law, then, was understood to be at the heart of the constitution. It was the benefits of living under English law that would both attract English settlers and win the hearts of the Canadiens.

It was on this part of the proclamation that much of the well-known conflict between the Governors of Quebec and the merchants was based. The merchants insisted both on their right to an assembly and on their right to English law. The Governors relied on the clause, "so soon as the state and circumstances of the said Colonies will admit thereof," to refuse to call assemblies that would exclude the Canadiens.

The courts were to be established by the governors empowered "under our Great Seal." The purpose of this provision was to clearly establish that the powers given were based on the prerogative of the Crown. The concern of the Lords of Trade had been that if the Indian territories were outside the government of the Governors, commissioned "under the Great Seal," they might be seized by some other power on the pretext that they were not under the sovereignty of the King. The Great Seal symbolized that sovereignty. There was no doubt that the form of government being established was a monarchy.

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[22]Shortt and Doughty, p. 120.

To further the end of settlement, reduced officers and disbanded soldiers residing in the colonies were to be granted land. These grants were to be made without fee and subject only to the usual conditions of cultivation and improvement. Quit-rents would not be required for ten years. Field officers were to be granted 5,000 acres, captains 3,000 acres, staff officers 2,000 acres, non-commissioned officers 200 acres and private soldiers fifty acres. Note that though the land was granted on very generous terms, different acreages were granted according to rank. The differences in the amount of land granted were based on no practical necessity but on the accepted status differences of a hierarchically ordered society. These were to be recognized and reinforced at the same time as provision was made for the better security of the colony and for the disbanded soldiers and officers.

The proclamation went on to reserve to the various Indian nations the lands outside of the boundaries of the colonies. The preamble to this section gives the justification for this policy:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom we are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.[23]

Three justifications are given: the policy is just or morally sound, it is reasonable, or in accord with the tenets of reason and it is pragmatic, in that it will enhance the security of the King's colonies. The Governors were directed to permit no survey or patent for any land west of the Atlantic watershed. No private purchase of any land from the Indians was to be permitted within any of the settlement areas. This further protection of the Indian lands from purchase arose from a concern that they would be vulnerable to unscrupulous traders and speculators. It was both pragmatic and paternalistic. Trade with

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[23]Shortt and Doughty, p. 121.

the Indians was to be free to all the King's subjects upon license from the Governor or Commander in Chief of any of the colonies.

The proclamation concluded with a direction to all military or civilian officers of the Crown to return any fugitives who attempted to escape the reach of the law by flight into the Indian territories to the colonies where the crime of which they were accused took place.

The various interests of the Crown in the colony are clearly expressed in this document. The first concern was to establish the sovereignty of the British king over the territories in question. The second was to enhance the trade and commerce of the mother country. This was to be accomplished by settlement and by measures designed to protect the trade of British subjects. By reserving the western lands as hunting grounds for the Indians, it was hoped that threats to the security of the colonies from that direction would be reduced. Finally, order was to be maintained both within the colonies and in the western territories.

Legitimacy has two functions – it both encourages submission to power and places restraints on the exercise of that power. If monarchy bases its claim to legitimacy on the divine right of kings, the monarch's use of his power is restrained by the idea that he is accountable to God. If the legitimacy of government is founded on a notion of contract, then both parties, ruler and ruled, are bound by the terms of the contract.[24] Thus the intended audience for the legitimating rituals of a government includes both the rulers and the ruled.

We have examined the ritual of the proclamation of James Murray's Commission as Governor from the perspective of the ruled. When we turn to an examination of the Commission itself, we turn our attention to the ruler. The Commission first sets out the

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[24]Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America (New York: W.W. Norton & Company, 1988), p. 15.

King's title. "George the Third by the grace of God of Great Britain France and Ireland King Defender of the Faith and so forth; To our Trusty and well beloved James Murray Esquire, Greeting." The archaic formula "by the grace of God ... King" alludes to the by no means defunct theory of the divine ordination of kingship. In form, the Commission was a personal letter from the King to the Governor, testifying to the personal nature of social relations in a kingdom. The King derives his authority from the grace of God and in turn bestows authority on the Governor:

> We, reposing especial trust and Confidence in the prudence, Courage and loyalty of you the said James Murray, of our especial grace, Certain Knowledge and meer motion, have thought fit to Constitute and appoint, and by these presents, do Constitute and appoint you, the said James Murray to be our Captain General and Governor in Chief in and over our Province of Quebec in America.[25]

The grace of God which makes George III King is echoed in the grace of the King, which makes James Murray Governor. The Commission constitutes him Governor. In this world, words have ritual power. Interpolated between the subject, We, and the verb of the sentence, do constitute, are two phrases. The first gives the reason for his appointment: the King reposes special trust and confidence in his prudence, courage and loyalty. These are the qualities that he must display in his execution of his office. The second asserts the King's right to so constitute him governor. It is by his special grace, knowledge and "meer motion." These words emphasize the King's prerogative or freedom to do as he wills.

Of course the actual genesis of the Commission was not the King's "meer motion" and the Commission was not a personal letter from George III to James Murray. The Lords of Trade had been directed by Lord Egremont, on behalf of the King, to prepare a draft of the Governor's Commission. This draft was read in the Privy Council, then referred to the Committee of Council for Plantation Affairs before being finally approved by the King in Council. The Earl of Halifax was then directed to cause Warrants to be prepared for the King's signature, "in order to pass the said Commissions under the Great Seal of

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[25]Shortt and Doughty, p. 126.

Great Britain." Even after this, additional clauses were inserted by the Privy Council.[26] It was, however, the King's signature and the imprimatur of the Great Seal that made the Commission – and the Governor – legitimate. Thus, the Commission captures the constitution in transition. At one time, commissions had been personal, and they retained this personal aspect in the eighteenth century in the legitimating myths and rituals of authority.[27] By the middle of the eighteenth century, the machinery of state had become more bureaucratic. Committees and reports lay behind the specifics of the King's Commission to James Murray, however much the form seemed to show personal favour and obligation.

After outlining the boundaries of the colony, the Commission commanded the Governor to execute all that belonged to his command according to the powers and directions of the Commission, and the Instructions given with it, or by any additional instructions given under the King's signet and sign manual, or by order of the Privy Council, and in accordance with the laws made by him "with the advice and Consent of the Council and Assembly of our said Province." Four different restraints were therefore laid on the Governor in his exercise of his power. The first was the Commission and Instructions themselves, which both gave him his power and defined its limitations. The second was any future instructions issued by the King, in proper form to ensure their validity. This merely reiterated the royal prerogative. The third restraint was any future order of the Privy Council, thus plainly asserting the superiority of its authority over the Governor. The fourth restraint was quite different in orientation. The Governor was to execute his command in accordance with such reasonable laws as should be made thereafter by him with the advice and consent of the Council and Assembly of the province under his government. This provision seems to be a very significant restraint, but it was weakened by a clause later in the Commission which gave the Governor a veto

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[26]Shortt and Doughty, pp. 109,115,116,124,126.

[27]There is one other sense in which the personal aspect of government was retained. James Murray owed his various commissions and appointments in part to the patronage of the Duke of Newcastle. Thus, he was linked to the King by a personal chain of dependence.

against both the Council and the Assembly, and the power to adjourn, prorogue or dissolve the Assembly.

The Commission itself decreed that after the proclamation of the Governor's Commission and the appointment of the Council, the first order of business was that the Governor take the oaths, not of office, but against Catholicism, (the Oath of Allegiance and the Declaration of Abjuration). The eighteenth-century British constitution rested squarely on this anti-Catholic foundation, a fact that would prove to be the source of great difficulties in establishing a civil government in Catholic Quebec. Only after these oaths had been taken was the Governor to take the oath of office and the oath to uphold the laws relating to trade and plantations.

These oaths were all to be administered to the Governor by the Council of the Province. Then, he in turn was to administer the same oaths to them. The performance of this ritual took place in the privacy of the Council chambers. Therefore, the Governor and the Council members themselves formed the audience for whom the ritual was performed. Unless we are sensitive to the nature of an oath in a far from secular society, this ritual may appear somewhat ridiculous. It would seem as though they merely conferred authority on themselves by this ritual. It is true that legitimacy is as necessary to the wielders of authority as to its subjects, and so it is not meaningless that the Councillors and Governor were the only audience. But an oath is more than a formality in the eighteenth century. It is solemn and binding in part because God is understood to be party to it. It is not a mere contract that can be dissolved at will, though. Rather, it fits within the understanding of society as a kingdom, with all the panoply of hierarchical relationship and obligation. Just as the King derived his authority from divine ordination, and was thereby both authorized and restrained by it, so too were the Governor and Councillors both authorized and restrained by their oaths.

The Commission then granted the Governor the power to keep and use the Great Seal of the Province and to call an Assembly of the Freeholders and Planters as soon as

circumstances permitted. The duly elected representatives were to take the oaths against Catholicism without which no person would be capable of sitting as a member of the Assembly, even if elected. The Governor together with the Council and the Assembly were empowered to make laws for the government of the colony. These were not to be repugnant to the laws and statutes of Great Britain, and were to be transmitted to England for royal approval or disallowance.

The Governor was further empowered to erect Courts of Judicature, with the consent of Council, and to appoint Judges, Justices of the Peace, sheriffs and the other officials necessary to the administration of justice. The personnel of these courts were also to swear the Oath of Allegiance and the Declaration of Abjuration. To the Governor was reserved the right to pardon crime in all cases except treason or wilful murder, where he could only grant reprieves until the King's pleasure should be known. He was given the power of collating to any church in the province as well as the power to levy troops to be employed against "enemies, pirates, & Rebels". Within this power was included the power to march, embark or transport troops from one place to another, even to the other colonies in America.[28] All public monies raised within the province were to be spent by warrant from the Governor with the advice and consent of the Council. The power to grant lands was also given to the Governor, again with the advice and consent of the Council. Finally, the Governor and Council were empowered to order fairs and markets and harbours and wharfs, "for the conveniency and Security of shipping, and for the better loading & unloading of goods and Merchandizes."[29]

The constitution of the colony was completed by the eighty-two Instructions to the Governor which accompanied his Commission. The second Instruction sets out the composition of the Council: the Lieutenant Governors of Montreal and Trois Rivières, the Chief Justice of the Province, the Surveyor General of Customs for the Province, and

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[28]This seems to conflict with the reality of Murray's situation, as he was not given command over the troops garrisoned in the province, an omission he protested vehemently, but to no avail. James Murray to the Earl of Halifax, 15 October 1764, Shortt and Doughty, pp. 152-153.

[29]Shortt and Doughty, p. 131.

eight other persons appointed by the Governor "from amongst the most considerable of the Inhabitants of, or Persons of Property" in the Province. They were to enjoy all the powers, privileges and authorities enjoyed by Council members in the King's other colonies. The Instructions reiterated the clause in the Commission that the Governor was to call the members of the Council together and to have his Commission read to them, after which both Governor and Councillors were to take the Oaths. The Governor was empowered to remove or suspend any Council member if he found just cause to do so. He was, however, instructed to do so only with the consent of the majority of the Council after due examination of both the charge and the Councillor's reply to it, all of which was to be duly entered in the Council books and transmitted to the Board of Trade.[30] Thus the Council was to be subordinate to the Governor but protected by due process from arbitrary action on his part.

The Governor was instructed to make rules and regulations for the "Peace, Order and good Government" of the Province with the advice of the Council, until such time as an Assembly could be called. These regulations were not, however, to affect the Life, Limb or Liberty of the subject or impose any taxes or duties. All such regulations were to be transmitted to Britain for royal approval or disallowance. No law affecting commerce or shipping, the prerogative of the Crown or the property of the King's subjects was to be finally passed but was to be sent in draught form to the King, its execution suspended until the King's directions on it were known.[31]

Two major restraints were placed on the legislative powers of the Governor and Council by the Instructions. Without the sanction of an Assembly, the legislative powers were to be restricted since laws passed by the Governor and Council would not have the legitimacy that an Assembly could give them. The political culture of Britain required the procedural legitimacy of a representative assembly to validate laws touching life, limb or property. The other restraint was one which prevented any encroachment on the

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[30]Shortt and Doughty, p. 134.

[31]Shortt and Doughty, p. 136.

royal prerogative or conflict with the interests of the mother country. Quebec was a colony, after all, and the purpose of colonies was to benefit the mother country.[32]

Included in the Instructions were a number of measures designed to deal with the problem posed by the Catholicism of the Canadiens. First, the Governor was instructed to conform with the stipulations of the Treaty of Paris, where liberty had been granted to the inhabitants of Canada to profess the worship of their religion according to the rites of the Roman Catholic Church, as far as the laws of Great Britain might permit. A letter from Egremont to Murray a year before his official Commission as Governor laid great stress on the phrase, "As far as the Laws of Great Britain permit." It was feared that the French might try to use the liberty of the Catholic religion granted to the Canadiens to keep them connected to France and to continue, through the priests, an influence over them so as to gain their assistance in any attempt to recover the colony for France. Egremont instructed Murray to watch the priests very closely and remove any of them that attempted to interfere in civil matters. The laws of Great Britain mentioned in the Treaty "prohibit absolutely all Popish Hierarchy in any of the Dominions belonging to the Crown of Great Britain, and can only admit of a Toleration of the Exercise of that Religion."[33] This was to become the hallmark of British policy towards the Canadian church – toleration of Catholic worship but prohibition of any foreign connection or ecclesiastical jurisdiction.

The inhabitants were to be summoned as soon as possible to meet together and to take the Oath of Allegiance and to subscribe the Declaration of Abjuration. Any French inhabitants who refused to do so were to be forced to leave the province. They were also to give on oath an account of arms and ammunition in their possession. A full report on the religious communities, the churches and priests was to be submitted by the Governor as soon as possible. The Governor was "not to admit of any Ecclesiastical Jurisdiction of

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[32]As Charles M. Andrews put it, "...colonial interests and advantages were to be subordinated to those of the mother state." The Colonial Period of American History: England's Commercial and Colonial Policy (New Haven: Yale University Press, 1938), pp. ix, 7, 303.

[33]Shortt and Doughty, p. 124.

the See of Rome or any other foreign Ecclesiastical Jurisdiction whatsoever," in the Province.[34] The great suspicion of Catholicism as a political threat to the sovereignty of Great Britain was thus highlighted in the Instructions. It was not the souls of the Canadiens that concerned the Privy Councillors, nor was it their ethnicity; it was their political allegiance. The eighteenth century was a pragmatic era, little animated by the religious fervour of the seventeenth century or the nationalistic fervour of the nineteenth, but the Church remained an essential pillar of society.

The proscriptions circumscribing Catholic influence were followed by a number of measures designed to establish and strengthen the Church of England in the colony, "that the said Inhabitants may by Degrees be induced to embrace the Protestant Religion, and their Children be brought up in the Principles of it." These included directions that land be set aside for the support of Protestant schools and Protestant churches, that the Book of Common Prayer be read and the Sacrament administered according to the Rites of the Church of England, that Schoolmasters have a licence from the bishop of London, and that laws against vice and immorality be vigorously enforced. Though it had no faith in seventeenth-century religious fervour, the governing elite in London did not believe in a secular society – the church, in this case, the Church of England, was an essential part of the state.[35]

A number of Instructions followed, regarding the granting of lands, so essential for the settling of the colony with the desired Protestant inhabitants. This led quite naturally into Instructions concerning the Indians:

> And whereas Our Province of Quebec is in part inhabited and possessed by several Nations and Tribes of Indians, with whom it is both necessary and expedient to cultivate and maintain a strict Friendship and good Correspondence, so that they may be induced by Degrees, not only to be

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[34]Shortt and Doughty, p. 139.

[35]As Hilda Neatby observed regarding the problems the British politicians had with an assembly for the colony, "As for the constitution, an English colony without an assembly seemed unthinkable, an assembly including Roman Catholics unreliable, and an assembly excluding Roman Catholics unjustifiable." Hilda Neatby, Quebec: 1760-1791 (Toronto: McClelland and Stewart Limited, 1966), p. 127.

> good Neighbours to Our Subjects, but likewise themselves to become good Subjects to Us; You are therefore, as soon as you conveniently can, to appoint a proper Person or Persons to assemble, and treat with the said Indians, promising and assuring them of Protection and Friendship on Our part and delivering them such Presents, as shall be sent to you for that purpose.[36]

The Governor was to cultivate friendship with the Indians because it was both necessary and expedient but the ultimate goal was to make them good subjects – by choice, it appears, rather than by force. This statement indicates a recognition that the various nations of Indians were not subject to the King at that time. It was a goal to be worked towards. The independence of the Indian nations was acknowledged again and again in the official documents of this period. It was not until the influx of loyalists after the American War of Independence that this acknowledgement was breached. Before that, the method recommended in the Instructions was generally followed by the Governors, except for some difficulties when Indian presents were reduced because of a concern for economy.

The Instructions reveal the intentions of the administration in London with respect to the colony. They touch on the major issues facing the Governor in the establishment of civil government in the colony: the personnel of administration, the courts of judicature, the problem of the Catholicism of the Canadiens, the relations with the Indians. The events of the following years forced modifications in these plans and intentions.

Governor James Murray faced a difficult task in attempting to establish a stable civil administration in a complex situation[37]. Part of his task was practical – the creation of the various structures that constituted government. But another part was to invest those structures with legitimacy, to make them acceptable and right in the eyes of the governed. To accomplish this part of his task, he drew on a rich vocabulary of rituals and

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[36]Shortt and Doughty, p. 145.

[37] As Linda Kerr's dissertation shows, his task was made more difficult by the instability and political changes in London which resulted in interminable delays in the handling of the affairs of the colony.Linda Kerr, "Quebec: The Making of an Imperial Mercantile Community, 1760-1768," Ph.D., University of Alberta, 1992.

procedures. Two traditions provided the bulk of this vocabulary – feudalism and the Church. In both of these traditions common ground could be found between His Majesty's old and new subjects. The Canadiens had previously been ruled by a king; by divinely sanctioned conquest, they had come under the rule of His Britannic Majesty, George III. A change had occurred but they were no strangers to monarchy. Oaths were important parts of the rituals that Murray used to legitimate the civil structures put in place. These partook of both the feudal and Christian traditions. Oaths of fealty marked all feudal relationships and it was the sacred nature of an oath that made it binding. I do not mean to suggest that Murray was entirely aware of using ritual as a strategy of legitimation. In fact, the very "naturalness" of the ritual acts undertaken was essential to their success. Murray sought to do what seemed to him proper and appropriately dignified for the occasion. Because in so doing he made reference to a shared vocabulary, it is likely that His Majesty's new subjects understood what was being done.

Chapter Two - The King's Servants

Eighteenth-century English society was an aristocratic society. According to Jonathan Clark, "[Aristocracy] has for its intellectual or moral foundation the conviction that the inequalities or differences which distinguish one body of men from another are of essential and permanent importance."[1] When the British sought to establish a stable social and political order in Quebec, they naturally paid careful attention to status differences. English society was also both a personal society and one where patronage was the norm. These characteristics, which fit so well with an aristocratic ethos, can also be clearly seen in the arrangements made in Quebec

When General James Murray, who had held the military governorship of the district of Quebec since 1759, became the first civilian governor of the new colony, he became the most senior of the King's servants in the colony. But the King required many more servants to administer the colony – Council members, officials, even Justices of the Peace were the King's servants. What were their backgrounds? What qualifications were thought necessary for a servant of the King? Murray, himself, was the fifth son of Alexander Murray, Baron Elibank, a Scottish peer. Although the Elibank family had been implicated in a Jacobite plot in the 1750's, there is no suggestion that Murray himself had Jacobite leanings.[2] In fact, his patrons were William Pitt and the Duke of Newcastle, both prominent Whigs. Because Murray could not inherit the title or estate, he had made his career in the military.[3] Murray, in common with other appointees of his day, owed his position to the influence of his patrons. He thanked the Duke of

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[1]A.V. Dicey, Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century (1905, 2nd edn, London, 1924), pp. 48, 50; quoted in J.C.D. Clark, English Society p. 7.

[2]Sir Charles Petrie, "The Elibank Plot, 1752-3," Transactions of the Royal Historical Society 14 (1931) 175-196.

[3]Dictionary of Canadian Biography, Vol. IV., p. 569. Linda Colley has pointed out the importance of Scots in the administration of the British Empire, although I cannot agree with her characterization of their role. Linda Colley, Britons: Forging the Nation, 1707-1837 (London: Random House, 1992), pp. 131-132.

Newcastle for his appointment as military governor in 1760. He described himself as a "meer Soldier of Fortune," but he was very well-connected.[4]

The senior officers in the other two districts, Brigadier General Ralph Burton and General Thomas Gage were appointed Lieutenant Governors in Trois Rivières and Montreal respectively.[5] They refused these civilian appointments, considering it beneath their dignity to accept positions under Murray who had hitherto been Burton's equal in rank and Gage's inferior.[6] In his letter to the Board of Trade of 2 March 1765, Murray gave his view of Burton's situation:

> Coll. Burton who had aimed at the Government of the Province and refused the Lieut. Government, is appointed a Brig[adier] on the American Staff and remains to command the Troops of Montreal. It is not natural to expect that a Man will be contented with the command of a few Troops in a country he had so long governed without controul.[7]

Murray felt his own situation equally unsatisfactory. His commission as governor did not give him command over the troops in his Province. Gage and Burton declared that he "could have no Command over the Troops in their respective Districts." When Gage became Commander in Chief of the Forces in America, Burton was advanced to the command of the troops at Montreal. Murray was offended by the promotion of a junior officer over his head, a point upon which he, in common with other officers of his day, was touchy. Writing to his patron, the Duke of Newcastle, in 1758 with respect to a possible promotion to colonel of an American Battalion, he claimed that if a junior officer were appointed to the post the mortification to him would be insupportable.

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[4]James Murray to the Duke of Newcastle, 25 May 1760, British Library, Newcastle Papers, Add. MSS. 32906, ff. 259, 260. According to Linda Colley, some of John Wilkes' animus towards Scots may have stemmed from the fact that he lost out to James Murray on this appointment. Colley, Britons, pp. 89-90.

[5]Burton was the son of a Yorkshire attorney, but Gage was the son of an Irish peer. Burton died in 1768 but Gage was later governor of Massachusetts. Burt, pp. 14, 31.

[6]Burt, p. 87.

[7]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 41/53, f. 282.

> Without declaring myself destitute of that Spirit which should characterize a Soldier, I can not stoop to be commanded by a Junior Officer, who has not Superior Military Pretensions...should I now be laid aside on Mr Gages account, I never can hold up my head, must be totally undone and deservedly despised if capable of Submitting to it.[8]

This sensitivity to rank and precedence was not unique to Murray. It was, rather, integral to the eighteenth-century European world; part and parcel of a whole set of attitudes about the nature of society, held by the elite and even more strongly by the military officers, but accepted by almost all people within the society. Enclosed with Jeffrey Amherst's Royal Commission as Commander in Chief of His Majesty's Forces in America was a list entitled, "Rules and Regulations for the Rank and Precedence to be observed between the Commanders-in-Chief, Generals, and other Officers of our forces in America and the Governors, Lieutenant Governors, and Presidents of the Council and with Regard to the Rank of the Provincial Officers, when acting in Conjunction with our regular Forces."[9] Rank and precedence mattered; it was an aristocratic society.

In 1765 it was necessary for Welbore Ellis, Secretary at War, to clarify the respective jurisdictions of the military and the civil governors in America in a memorandum to the Earl of Halifax:

> His Majesty's Intention is, that according to His Commission granted for that Purpose, the Orders to his Commander in Chief, and under him of

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[8]General James Murray to the Duke of Newcastle, 1758, British Library, Add. MSS. 32877, ff. 300-301.

[9]"The order is as follows: 1) Commander in Chief; 2) Captains General and Governors in chief of our Provinces and Colonies when in their respective governments; 3) General Officers upon the staff; 4) Captains General and Governors in chief of our Provinces and Colonies when OUT of their respective governments; 5) Lieutenant Governors and Presidents of Councils when Commander in Chief of our Provinces and colonies in their respective governments; 6) Colonels; 7) Lieutenant Governors and Presidents of Councils when Commanders in Chief of our Provinces and Colonies, when out of their respective Governments; 8) Lieutenant Governors of Proprietary Governments when in their respective governments: 9) Lieutenant Governors of our Provinces and Colonies not being Commanders in Chief out of their respective governments; 10) Governors of Charter Colonies when in their respective Colonies; 11) All Field Officers under the Rank of Colonels; 12) Lieutenant Governors of Proprietary Governments out of their respective governments; 13) Governors of charter colonies out of their respective Colonies; All Captains General and governors in chief of our provinces to take rank according to the dates of their commissions; All Lieutenant Governors the same; all Lieutenant Governors of Proprietary Governments the same; Governors of charter Colonies according to the date of their charters." George III to Jeffrey Amherst, Enclosure with Commission, British Library, Add. MSS. 21697.

> the Brigadiers General commanding in the Northern & Southern Departments, in all Military Matters, shall be supreme, & must be obeyed by the Troops, as such, in all the Civil Governments of America.
>
> That in Cases, where no specific Orders have been given by the Commander in Chief or by the Brigadiers General Commanding in the District, the Civil Governor in Council, and, where no Council shall subsist, the Civil Governor may, for the Benefit of the Government, give Orders for the Marching of Troops, the Disposition of them, for making and marching Detachments, Escorts, and such purely military Services, within his Government, to the Commanding Officer of the Troops, who is to give the proper Orders for carrying the same into Execution, provided they are not contradictory to or incompatible with any Orders he may have received from the Commander in Chief or the Brigadier General of the District; and the Commanding Officer is, from time to time, duly to report, with all convenient Expedition, to the Commander in Chief or to the Brigadier General such orders, which he shall have so received from the Civil Governor.
> That the Civil Governor of the province shall give the Word in all Places, where he shall be within his province, except when the Commander in Chief or Brigadier General shall be in the same Place.
> That the Return of the State and Condition of the Troops, Magazines and Fortifications shall be made to the Governor as well as to the Commander in Chief and Brigadier General.
> That the Civil Governor is not to interfere with the detail of the military regimental Duty & Discipline, the Reports concerning which are to be made to the Commanding Officer who is to make his general Report to the Civil Governor.
> When the Commander in chief or Brigadier General shall be present all Military Orders are to be issued by them only.[10]

Clearly, the Commander in Chief and the Brigadiers General were placed above the civil governors in authority. This was to prove particularly problematic in the colony of Quebec.

Next in rank to the Governor in the civil administration were the members of His Majesty's Council: Lieutenant Colonel Paulus Aemilius Irving, Captain Hector Theophilus Cramahé, Captain Samuel Holland, Walter Murray, Dr. Adam Mabane,

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[10]Extract of a Letter from the Rt. Honble. Welbore Ellis, Secretary at War, to the Earl of Halifax, 7 February 1765, British Library, Add. MSS. 59238, ff. 146, 147.

Benjamin Price, Thomas Dunn, and Francis Mounier. The first three were former military officers and Mabane had been an army surgeon when he came to Canada in 1760. Governor Murray mentioned in the list appended to his letter to the Lords of Trade of 23 August 1764 that he would have appointed another officer, Captain John Brown of the Royal American Regiment, "had I not been fearful of offending by the nomination of too many of my own profession."[11] Walter Murray was a relative of the Governor and heir at that time to the Elibank estate. Hector Theophilus Cramahé was a Huguenot who had been Murray's secretary since his appointment as military governor of Quebec.[12] Francis Mounier was a very welcome addition to the Council as he was also a French Protestant, a Huguenot who had resided in Quebec since before the Conquest.[13] Murray mentioned in the letter to which the list was appended that he thought the choice of Mounier would be "not only encouraging to the New Subjects, but may induce many to embrace our Religion, that they may be admitted to like advantages."[14] There were also several ex officio members of the Council, the Chief Justice, the Surveyor General of His Majesty's Customs, and the two Lieutenant Governors of the Districts of Montreal and Trois Rivières. Since neither Burton nor Gage accepted their appointments as Lieutenant Governor, these posts went unfilled and were later discontinued.[15]

Murray's list of the Council members included eight alternates should vacancies need to be filled or should His Majesty wish to make changes. To each name in Murray's list, member or prospective Council member, was appended a short description. The list together with the descriptions offers insight into the qualifications for membership in the governing elite of the colony. The number of military officers on the Council has already

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[11]James Murray, List, 23 August 1764, PRO CO 42/1, ff. 395, 396.

[12]Burt, p. 14.

[13]Burt, p. 87.

[14]James Murray to Board of Trade and Plantations, 23 August 1764. PRO CO 42/1, ff. 392-393.

[15]Ibid.

been noted. Three more Captains appeared on the alternate list. Sir James Cockburn, a former officer, had purchased a seigneury in the province and although he had not yet arrived in Quebec, he was recommended as an alternate as well known to Mr. Oswald, Joint Treasurer of Ireland. The remaining men on both the list of Councillors and the list of alternates were described as merchants. Their places of origin were given if they were not military men, and a few words about their characters were offered.

Of the sixteen men on the two lists, seven were merchants: three Scottish, two English and one from New England. The seventh merchant was the Huguenot, Francis Mounier. Murray noted at the end of the lists that he had been "tender of admitting too many merchants to His Majesty's Council least private views should interfere with publick advantage."[16] The terms used to describe the merchants were "considerable," "enterprizing," and "of very fair character." Wealth recommended them where birth was lacking.

The merchants were not termed Gentlemen, though some of the military men were. Great debate raged in the seventeenth and eighteenth centuries about the definition of a gentleman. As late as 1692, Edward Chamberlayn's Angliae Notitia, a standard reference work, stated that the heralds were of the opinion that a gentleman lost his gentility by either shopkeeping or by apprenticeship. But the edition of 1700 made no such assertion. Even the earlier editions had granted that, "To become a merchant of foreign commerce, without serving any apprenticeship, hath been allowed as no disparagement for a gentleman born, especially to a younger brother." By 1710, Richard Steele in The Tatler, was able to define a gentleman by his behaviour rather than by his circumstances – not by his birth or occupation but by his manners.[17] The question was whether a man could

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[16]James Murray, List, 23 August 1764. PRO CO 42/1, ff. 395-396.

[17]Lawrence Stone and Jeanne C. Fawtier Stone, An Open Elite? England, 1540-1880 (Oxford: Clarendon Press, 1984), p. 23.

be a gentleman and a merchant. Landed property was still the hallmark of gentility, but changes were occurring that required redefinition of the standards.

Half of the sixteen were military men. Walter Murray, Paulus Aemilius Irving and Adam Mabane brought the Scots contingent up to six, and Captain John Fraser was likely a Scot as well. Of course, Murray was a Scot himself, but the large proportion of Scots on the Council was due to more than national preference in his part. Linda Colley has argued that, in terms of manpower, the British Empire might be better termed a Scottish empire. Both the military and the mercantile profession attracted Scots and the colonies offered opportunities not available at home.[18]

Several of the descriptions included the comment that the man had purchased or proposed to purchase land. Others were described as having settled in the colony. This was a very important consideration as only those who owned property were regarded as eligible to have a say in running it.

Murray knew the men on the lists well, and was able to give detailed descriptions of a number of them. Although Captains Cramahé and Holland were not described, the reason was not that they were unknown to Murray. On the contrary, they were too well known to his correspondents to require introduction; the comment was simply "Character well known."[19]

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[18]Colley, Britons, pp. 130-132. Colley speculates that the contemporary critique of Scots in the administration of the Empire – that they were more inclined to absolutist, arbitrary rule – may have been based in fact. She seems to accept an inherent equivalence between the by no means universal Jacobite sympathies and absolutism. For example, she argues, "it is possible that some Scottish imperialists at least found the business of presiding over thousands of unrepresented subjects neither very uncongenial nor particularly unfamiliar." Colley, p. 132. By contrast, Russell Snapp, in his study of colonial administration in the Carolinas, has argued that Scots officers tended to be more protective of Indian rights. And Murray himself was regarded as autocratic by contemporary critics for his defence of the rights of the Canadians.

[19]James Murray, List, 23 August 1764. PRO CO 42/1, ff. 395, 396.

Personal character figured largely in the recommendations. According to Murray, Captain John Brown "possesse[d] everything that can recommend the Heart, and adorn the mind of a Man." "A braver officer, nor a better man [did] not exist," than Lieutenant Colonel Irving. The amiability of several of the men was noted. Good sense and a liberal education were also mentioned as qualities of some of the men.

These men were chosen personally by Murray based on his judgement of their suitability. In order to be so chosen, then, one had to be known to the Governor. One had to be of suitable rank and status, but amiability and an attractive character were also important considerations. That Walter Murray was his relative was no impediment to his appointment. To be well known to persons of influence was a recommendation in itself. This was face-to-face society where personal relations had not yet given way to relations mediated by bureaucracy or professionalism.

While this list presents Murray's most optimistic view of the Council and the elite of the colony, it is important to set this beside his less positive comments in the same letter on the difficulty of creating a civil administration:

> Your Lordships will be pleased to observe in this, and in the appointment to all Civil Offices, I must be under the greatest Inconveniences. The British Subjects in this Province consist of two very different sets of People, the Military, and Mercantile, whom Duty or Interest have led here, and who can be considered only in the light of Passengers, few have acquired Property therein and consequently cannot be supposed thoroughly attached to its Interests, yet as there is no other Choice, we must endeavour to make the best of it for the King's Service and the Good of the Province.[20]

Landed men were what the colony lacked, at least landed men who could take civil office. The appointment of Francis Mounier to the Council shows that Canadiens were excluded from office not by reason of language or former allegiance but by religion.

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[20]James Murray to the Board of Trade and Plantations, 23 August 1764. PRO CO 42/1, ff. 392-393.

The importance of the ownership of property, especially landed property, in eighteenth-century ideas of the nature of society is highlighted here. According to John Locke, it was the ownership of property that indicated consent to the original contract whereby authority was given to the government by the members of the common-wealth. The state was the guarantor of property rights.[21] But it was not necessary to know or subscribe to Locke's ideas on property to hold the view that only men of property were capable of participating in public life. As Murray argued, only landed men could be truly attached to the interests of the colony. Lawrence Stone cites casual remarks made by Members of Parliament in the course of parliamentary debates to show how commonplace was the view that "only the possession of some landed property gave legitimate access to the vote and thus to the political process." "There is no such security of any man's loyalty as a good estate." "[T]he Commons...think themselves safest in the hands of men of great estates."[22] According to Boswell, Lord Kames agreed with him in 1782 that "if property was the principle, a man should have a number of votes in proportion to it; and he thought men of large property less liable to be bribed."[23] In a phrase echoed by Murray in his complaint to the Board of Trade, Viscount Bolingbroke argued in around 1750 that "the landed men are the true owners of our political vessell; the monied men, as such, are no more than the passengers."[24]

Property gave one independence as well as an interest in the state. If one did not own property, one was dependent on someone else. One could not, therefore, act freely, but

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[21]Locke, Second Treatise, p. 64.

[22]Lawrence Stone and Jeanne C. Fawtier Stone, An Open Elite? England, 1540-1880 (Oxford: Clarendon Press, 1984), p. 13.

[23]Boswell, The Applause of the Jury, 1782-1785, ed. I.S. Lustig and F.A. Pottle, (New York, 1981) p. 21, cited in Stone and Stone, Open Elite?, p. 13.

[24]H. St John, Viscount Bolingbroke, "Reflections on the State of the Nation", in Works (London, 1844) p. 458, cited in Stone and Stone, Open Elite?, p. 22.

must do the bidding of one's master. Part of the debate in the seventeenth century over whether a gentleman lost his gentility by becoming a merchant related to the nature of apprenticeship, whereby a person entered into servitude, which was akin to slavery.

The relationship between a master and his servant was not the same relationship as the present-day understanding of the relationship between an employer and an employee. A modern employer buys the labour of his employee for a specific period of time. A servant, by contrast, entered into a much closer and more complete relationship with his master. He became part of his household. Descriptions of the household governed by paternal authority generally included servants, listing them after the man's wife and children.[25] While the father's authority over his household was not absolute, it was extensive. The servant, like the wife or child, participated in society only vicariously, his identity subsumed in that of the head of the household. Thus, in eighteenth-century terms, it would not be reasonable to give such a person a political role.

Dependence of another sort was also a worry. If one did not derive one's wealth from land, one derived it from finance or from office. Finance in the eighteenth century meant involvement in a complex, mysterious and unstable world. As Norma Landau argues, the financial needs of the warfare state had resulted in the creation of a new financial structure, based on the Bank of England. The King was the largest debtor in the land and profitable investment in the "funds" was dependent on taxation. Those who derived their wealth from finance profited at the expense of the country as a whole and were considered to be a corrupting influence. Another route to wealth was through office, also in the control of the executive. The Country perspective on politics had long held

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[25]Schochet, pp. 57-58, 65; Christopher Hill, Society and Puritanism in Pre-Revolutionary England 2nd ed. (New York, 1967), pp. 470-1; Peter Laslett, The World we have lost 2nd ed. (London, 1971), p. 21; Locke, Second Treatise, p. 45.

that such men were susceptible to corruption by an arbitrary executive. Stability and freedom from arbitrary rule lay in the independence of landed gentlemen.[26]

Once the Governor and the Council had duly administered and taken the various oaths, they began the process of civil administration. First, they ordered the Chief Justice, William Gregory, and the Attorney General, George Suckling, to prepare a plan for the establishment of Courts of Judicature and for the administration of justice in the colony. These officials were also to give their opinion on a proposal to appoint Justices of the Peace as the most speedy method of providing interim services in petty causes until such Courts could be established.[27] Thirty-two Justices of the Peace for the two Districts of Quebec and Montreal were duly named and entered in the Minute Book on 29 August 1764.[28]

The Justices of the Peace had long played an essential role in English government. This role was undergoing a significant but slow transformation in the eighteenth century. Norma Landau has described this transformation as a shift from a patriarchal to a patrician mode of paternalist rule. The patriarchal paternalist, she argues, saw himself as part of his community, while the patrician paternalist saw himself as separate from his

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[26]Norma Landau, The Justices of the Peace, 1679-1760 (Berkeley: University of California Press, 1984), pp. 148, 149.

[27]Quebec Minute Book, 20 August 1764, NAC RG1 E1, Reel C-85.

[28]For the District of Quebec: Joseph Deane, Henry St. John Phips, Apollos Morris, Simeon Ecuyer, Thomas Ainslie, Conrad Gugy, Lewis Mettral, John Marteilhe, John Grant, Francis L'Evesque, John Rowe, Richard Murray, John Nairne, Malcolm Frazer, Samuel Gridley, Thomas Woder, Peter Travers, Joseph Walker, and Hugh Finlay; For the District of Montreal: Moses Hazen, Conrad Gugy, Lewis Mettral, Dumas St. Martin, Thomas Lambe, John Livingston, Francis Noble Knipe, John Frazer, Hugh Finlay, John Grant, John Rowe, Samuel Gridley. Quebec Minute Book, 29 August 1764, NAC, RG1 E1, Reel C-85. Murray's list of Commissions granted by him from 2 March 1765 to 21 June 1765 includes the members of His Majesty's Council in a separate list at the head of the commission. This corresponds with the English practice of the honourary clause of the commission, a separate list that appeared at the head of the Commission of the Peace. It included all members of the Privy Council, all titled aristocrats appointed to the commission, the sons of titled aristocrats, the judges who rode the circuit and those judges resident in the county, and the solicitor- and attorney-general. Landau, p. 365.

community. The former acted as a representative of the local community where the latter acted as a member of a group, a national elite:

> Because both patriarchal and patrician paternalists graced the eighteenth-century bench, the eighteenth-century justice remains our model of the quintessential justice. For the quintessential justice embodies both the patriarchal and patrician paternalist – both the local father who symbolizes the community and responds to its immediate needs and the more Victorian and distant paterfamilias whose rule accords with the just but impersonal laws of nature.[29]

This transformation was neither swift nor complete, but changes in the eighteenth century in the composition of the bench and in the structure of politics and local administration gradually resulted in a change in the relations of the Justices of the Peace to the people they governed. This change parallels the larger shift from a personal social order to a modern one where relations are mediated by form and bureaucracy.

Guides for Justices of the Peace had been published for some time in England, the classic being William Lambard's Eirenarcha: or the Office of the Justices of the Peace, published at least fifteen times between 1581 and 1619. It was supplanted by Dalton's The Countrey Justice which was republished throughout the seventeenth and early eighteenth centuries. Reverend Richard Burn's The Office of Justice of the Peace and Parish Officer then became the acknowledged authority.[30] According to Landau, Lambard (1581) and Dalton (1619), "had assumed that the rule of the [Justices of the Peace] was to a great extent based in their power as individuals."[31] These justices were eminent individuals in their community, whose influence lent weight and legitimacy to the office. As social superiors, they were to play a major role in healing and settling

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[29]Landau, p. 5.

[30]Landau, p. 334; Hilda Neatby mentions that Quebec Justices of the Peace relied on Burn's manual. Neatby, Quebec, p. 57.

[31]Landau, p. 340.

disputes in their communities without recourse to law.[32] Accordingly, they were expected to be substantial landed gentlemen. By the middle of the eighteenth century, the need to expand commissions of the peace because many of the gentry had shown themselves unwilling to act, combined with the exigencies of party politics, had resulted in a marked change in the composition of the bench. In 1761, there were more than twice as many Justices of the Peace in England and Wales as there had been in 1702 – 8,402 in all.[33] A series of Tory-sponsored bills in 1701, 1708, 1711, 1732, 1742 and 1745 attempted to establish minimum property qualifications for Justices of the Peace in line with a developing Tory ideology of the inevitable Whig corruption of Justices not so endowed with independence. Only the bills of 1732 and 1745 became statutes, but both of these settled for a qualification of land worth £100 per annum in income and the 1745 act defined land as an estate which "could include messuage, land, rent, tithe, office, benefice, or as the act stated, 'what else'."[34] According to Robert Walpole, this would exclude very few landed gentlemen. In the course of the Parliamentary debate on the salt tax in 1732, he said, "I believe that there are few landed Gentlemen in England, whose Estates do not amount to £100 per Annum."[35]

Necessity had lowered the qualifications of the Justices of the Peace so that almost any landed gentleman might serve. And this signalled a shift in the understanding of the office. According to Reverend Richard Burn's manual of 1755, any gentleman would make a good justice.[36] It was no longer his social pre-eminence that gave dignity to the office, but the dignity of English law that gave dignity to the justice. No longer the patriarch of his community, settling disputes through his influence, he was now the

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[32]Landau, pp. 173-175.

[33]Landau, p. 141.

[34]Landau, p. 160.

[35]Landau, p. 161.

[36]Landau, p. 339.

representative of the law itself, applying the law to settle disputes. In the past resort to law implied the failure of the justice's persuasive power as social superior.[37] Now this was the function of the justice. In fact the idea that the justice had a function is a modern innovation. Previously it had been his personal characteristics that made him effective. Now his virtue was to be a disinterested functionary. Burn's book became the complete manual for a Justice of the Peace and was acknowledged as such. In 1787, the Court of King's Bench allowed a dubious judgement of a Justice of the Peace to stand because it had been made correctly according to the procedure in Burn's manual.[38]

In Quebec, the situation was complicated by the fact that so few Protestants were landed gentlemen and that Catholics could not serve as Justices of the Peace. Murray's lament is worth repeating in this context:

> Your Lordships will be pleased to observe in this, and in the appointment to all Civil Offices, I must be under the greatest Inconveniences. The British Subjects in this Province consist of two very different sets of People, the Military, and Mercantile, whom Duty or Interest have led here, and who can be considered only in the light of Passengers, few have acquired Property therein and consequently cannot be supposed thoroughly attached to its Interests, yet as there is no other Choice, we must endeavour to make the best of it for the King's Service and the Good of the Province.[39]

At the same time as the Justices were appointed, Murray issued a Warrant to George Suckling, the Attorney General of the Province, directing him to "Form a set of Instructions for their Guidance in the Execution" of their office, since he had found it necessary to appoint men who "may not be thoroughly versed in the Duty of the Office."[40] According to the minutes of Council, it was the scarcity of Protestant subjects

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[37]Landau, p. 174.

[38]Landau, p. 341.

[39]James Murray to the Board of Trade and Plantations, 23 August 1764. PRO CO 42/1, ff. 392-393.

[40]Warrant, 29 August 1764, Warrants and Instructions, NAC MG 8 A16 vol.1, p.14.

that necessitated the appointment of such Justices. The District of Trois Rivières did not even have sufficient Protestant subjects, "capable of discharging the duty of the office of Justice of the Peace," to form a quorum for Courts of Quarter Sessions, so the colony was temporarily divided into two districts, Quebec and Montreal.[41] It was not legal training that the appointees lacked. In England at this time eighty per cent of the Justices of the Peace had never attended the Inns of Court and the widespread reliance on Burn's manual, The Justice of the Peace and the Parish Officer, also indicates that it was not only Quebec justices who required instruction.[42] Murray's concern arose more from the fact that the Justices of the Peace were not the right sort of people.

The Justices of the Peace who were appointed were to prove very troublesome to him. He was not able to appoint landed gentlemen; in fact, not all the members of His Majesty's Council were landed gentlemen. Instead he had to appoint the Justices of the Peace from amongst the substantial merchants of the colony and half-pay officers.

Murray transmitted Fair Copies of the Oaths and Commissions administered to the Justices of the Peace in his letter to the Board of Trade in July of 1765. Together with the ordinance which set out the limitations on their jurisdiction, these give a picture of the duties of the office and the expectations of the appointees. In the Oath of Office, the Justices were to swear to do "equal Right to the poor and to the Rich," according to the laws, customs and statutes of "the Realm". They were not to be "of Counsel of any Quarrell hanging before [them]"; thus, they were not to be judges in causes in which they were personally interested. They were to hold their sessions after the form of the statutes. All fines and forfeitures were to be duly recorded and remitted to the Receiver-General of the Province. They were to take nothing for doing this office from any one but the King and the "Fees accustomed and the Costs limited by Statute." They were not

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[41]Quebec Minute Book, NAC RG1 E1 Reel C-85, 27 August 1764.

[42]Landau, p. 339.

to direct any party to a dispute to execute any warrant but were to direct them to seek execution from the Bailiffs of the District or other of the King's officers.[43] The officers of the King must carry out the judgements rendered by the Justices of the Peace, thereby indicating their public nature and legitimation.

The Commission (Appendix B) charged the Justices of the Peace to cause all ordinances and statutes to be kept "for the good of the Peace, and for the preservation of the same and for the quiet Rule and Government of our People" and to punish all those who offended against the ordinances or statutes. They were to require any who had threatened others either in their persons or the "Firing of their Houses" to give security for the Peace or their good behaviour. If they were unable to give such security they were to be put into the prison.[44] This power of requiring people to enter into recognizances was in common use by the Justices of the Peace in England and was a form of mild punishment in and of itself, punishment for making threats, in this case.[45] Any two Justices were empowered by the Commission to inquire into the truth of "all manner of Felonies, Poisonings, Inchantments, Sorceries, Artmagick, Trespasses, Forestallings, Regratings, Ingrossings and Extortions whatsoever." Felonies, trespass, and extortion are quite understandable to the modern student. Forestalling, regrating and ingrossing are archaic terms for offences understandable only within the context of a moral economy[46]. In the nineteenth and twentieth centuries, such practices (now known as wholesaling), became the backbone of the economic system. The offences described as Inchantments, Sorceries and Artmagick are signs that this was not yet a modern world. The magistrates were to inquire into the truth of these matters "by the Oaths of Good

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[43]Fair Copy of Oath administered to the Justices of the Peace, included among papers annexed to Murray's letter of 15 July 1765. PRO CO 42/3, f. 143.

[44]Fair Copy of a Commission 22 May 1765 annexed to Murray's letter to the Board of Trade and Plantations 15 July 1765. PRO, CO 42/3, ff. 134-136.

[45]Landau, p. 24.

[46] Thompson, E.P. "The moral economy of the English crowd in the 18th century." Past & Present 50 (1971): 76-139.

and Lawfull Men of our Provinces aforesaid." Once again we have a glimpse of a society that is personal. The good and lawfull men of the community could be presumed to know what was going on in their community and it was on their honour that the investigation of the truth of these matters was staked. In practice, these good and lawful men were the Grand Jury who were to be summoned from time to time to deal with community concerns.

The Justices were also to inquire into all other crimes or offences and also into the truth of the matter of all those who, "in Disturbances of Our People with Armed Force have gone or Rode or hereafter shall presume to go or Ride and also of all those who have there lain in wait to Maim, Cut or Kill Our People." The Justices of the Peace were to be the protectors of the King's people, to act on his behalf in their protection. The King was once again portrayed as the fatherly protector of his people.

The next two clauses also invoke the King's paternal protection. In the first clause, the Justices of the Peace are instructed to inquire into any abuses in the use of weights and measures in the sale of foodstuffs or any selling of foodstuffs contrary to any ordinances or statutes, "made for the Common Benefit of that part of Our Kingdom called England and of Our People thereof," or against any such Law, Ordinance, Rule or Regulation of Quebec. Next, the Justices are to inquire of, "all Sheriffs, Provost Marshalls, Bailiffs, Stewards, Constables Keepers of Goals [sic] and all other officers," who have either "behave[d] unduly" or were careless, remiss or negligent in their execution of their offices.[47] By 1767 this clause was omitted from the Commission of the Peace.[48]

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[47]Fair Copy of a Commission, 22 May 1765, annexed to Murray's letter to the Board of Trade and Plantations, 15 July 1765, PRO CO 42/3, ff. 134-136.

[48]A Commission under the Public Seal of the Province of Quebec to Captain Schlosser to be a Justice of the Peace for the District of Montreal in the said Province, in A Collection of Several Commissions and other Public Instruments, Proceeding from His Majesty's Royal Authority, And Other Papers relating to the State of the Province of Quebec since the Conquest of it by the British Arms in 1760 Collected by Francis Maseres, Esquire (London: W. and J. Richardson, 1772). Republished 1966, S.R. Publishers Limited, Johnson Reprint Corporation, pp. 135-138.

The Justices were to inspect all indictments taken before them or any other Justices and to make processes against the indicted persons. And finally they were to hear and determine all these cases, provided that if any case of difficulty arose, they would give no judgement except in the presence of the Chief Justice of the Province. The Justices were to set times and places where they would regularly sit to hear and determine cases.[49]

By 17 September 1764, the Attorney General and Chief Justice had prepared, "An Ordinance for regulating and establishing the Courts of Judicature, Justices of the Peace, Quarter Sessions, Bailiffs and other matters relative to the Distribution of Justice in this Province." It was duly read and approved at the meeting of Council and published as a Supplement to the Quebec Gazette on 4 October 1764.[50] This ordinance established the structure for the administration of justice in the colony, a Superior Court (the Court of King's Bench), an inferior court (the Court of Common Pleas) and annual courts of assize and general jail delivery for the towns of Montreal and Quebec. The Chief Justice would himself preside over the Court of King's Bench, and Murray appointed three judges for the inferior court: Francis Mounier, Adam Mabane and Captain John Fraser.[51] Mounier and Mabane were Council members and Fraser's name appeared on Murray's alternate list. None of the three had any legal training, but Murray had no alternative. The colony was not rich in the legally trained.

The ordinance reiterated, in the clauses governing the Justices of the Peace, the limits on their jurisdiction that had been passed by the Council in August.[52] The ordinance

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[49]Fair Copy of a Commission, 22 May 1765, annexed to Murray's letter to the Board of Trade and Plantations, 15 July 1765. PRO CO 42/3, ff. 134-136.

[50]Quebec Minute Book, NAC RG1 E1, Reel C-85, 17 September 1764.

[51]Burt, Old Province of Quebec, p. 91.

[52]Quebec Minute Book, NAC RG1 E1, Reel C-85, 27 August 1764.

permitted a single Justice of the Peace within his District to hear and finally determine causes where the amount at issue was no more than five pounds. Two Justices together could hear and finally determine in all causes not exceeding the sum of ten pounds. No appeal was permitted from these decisions. Any three Justices of the Peace could hold Quarter Sessions every three months and there hear and determine causes over ten pounds but not exceeding thirty pounds. Liberty of appeal was reserved to either party to the Superior Court or to the Court of King's Bench.[53]

In addition to these duties set out in the Commission, Oath and Ordinance, the Council assigned the Justices of the Peace a number of other tasks over the next few months, such tasks as setting the Assize of Bread, providing certificates for persons seeking licences to run alehouses, inspecting suspected unlicensed alehouses and assigning billets to the troops then present in the colony.[54] The latter was to prove to be the source of much trouble. Justices of the Peace were also required to assist in cases of emergency, as a general warrant issued in August of 1765 indicates:

> To all and every His Majesty's Justices of the Peace and Bailiffs throughout this Province
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> Whereas a Sergeant and four private soldiers belonging to His Majesty's 28th Regiment of Foot were sent into the country on Sunday last, in pursuit of Deserters, and whereas I have received information of their having Killed a man in the parish of Chateau Richer, and being also informed that they are since gone by land towards Mal Bay: This is therefor is [sic] to require you and every of you to be aiding and assisting the bearer hereof Lieutenant Hill Commanding one of His Majesty's Vessels, in apprehending the said Sergeant and four men so that they may be brought back to this Town in safe Custody.[55]

The Justices of the Peace were to be the eyes and ears of the civil administration and in some cases, its arms and legs as well. In 1766 they were twice required to furnish lodgings

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[53]Quebec Gazette Supplement, 4 October 1764.

[54]Quebec Gazette, 11 October 1764; Quebec Minute Book, NAC RG1 E1 Reel C-85, 23 October 1764; Licence, 13 November 1764, PRO CO 42/4, f. 152.

[55]James Murray, Warrant, 13 August 1765. NAC MG 8 A16 vol 1, p. 71.

and carriages for movements of the troops, although it had been established in 1765 that Justices of the Peace could not order the impressment of men or materials in time of peace.[56]

The Ordinance that set out the duties of the Justices of the Peace also provided for the appointment of Bailiffs and Sub-Bailiffs. It was here and only here that a limited form of popular election was permitted. On the 24th of June every year, the majority of the householders in each parish were to elect six "good and sufficient Men", out of which the Governor and Council would appoint the Bailiffs and Sub-Bailiffs for each parish. The Bailiffs were to be sworn into office by the Justice of the Peace. No Bailiff was to serve twice until the whole parish had served its turn, and in order to provide continuity one of the Bailiffs each year was to be elected from those who had served as Sub-Bailiffs the previous year. No salary was attached to this office; it was the civic responsibility of the householders in the parish to serve.

The Bailiffs were the muscle of the civil government in the locality. They were responsible for overseeing the King's highways and public bridges, to ensure that they were kept in repair. They were to execute all Writs or Warrants, arresting criminals and conveying them to prison as directed by the Warrants. Where the Coroner could not attend, the Bailiffs were to "examine all Bodies that are exposed, and on whom any Marks of Violence appear, in Presence of Five reputable Housholders of the same Parish" and report in writing to the Magistrate so that further examination could be made if necessary. The final duty of the Bailiff set out in the ordinance was that of arbitrating disputes over fences. Upon complaint, he was to summon the defendant and both plaintiff and defendant were to choose three indifferent persons to decide the dispute.

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[56]James Murray, Warrant, 12 May 1766; Paulus Aemilius Irving, Warrant, 21 July 1766; NAC MG 8 A16 vol 1, pp. 92, 98; George Suckiling, Attorney General, to James Murray, 25 February 1765. PRO CO 42/3, f. 50, PRO CO 42/5, ff. 52-53; James Murray to Major General Burton, 9 October 1765, PRO CO 42/5, ff. 74-75.

Appeal from this decision was to the Quarter-Sessions, "the Person found in Fault to pay One Shilling and no more, to the Person who shall draw up the Decision."[57]

The duties of the Bailiffs allow us a glimpse of the commonplace occurrences that required the intervention of government in a society like eighteenth-century Quebec. Highways, bridges, the settlement of local disputes over fences – these are things that are necessary services of government in this society. The provision of these services helped to legitimize the civil administration in the colony. That the Bailiffs served their local parish where they knew and were known by every inhabitant, that they served in turn and without pay, shows an intimate, face-to-face, personal society. The participation of every householder in turn reinforced the legitimacy of the whole. Appointed by the Governor and Council, and sworn by the Justice of the Peace, they were firmly knit into the hierarchy of the administration, thereby connecting the locality to the centre.

Murray's long letter to the Board of Trade of 15 July 1765 included fair copies of a number of other Commissions granted by him in the first year of civil administration. John Campbell, Esquire, was commissioned as Inspector of Indian Affairs. William Gregory received his Commission as Chief Justice. Henry Kneller, Williams Conyngham, Nathaniel Minor, John Morison. John Burke, Samuel Bard and Thomas Hall, all termed Gentlemen, were given Commissions as Attorneys at Law. John Morison was the only Attorney to also be named as Barrister. James Shepherd and David Allgeo, also Gentlemen, were made Public Notaries by this instrument. Shepherd was also made Clerk of the Peace. Conyngham was first made then removed as Coroner and James Potts was commissioned in his place. Two Deputy Provost Marshalls were commissioned, Joseph Walker for the city and District of Quebec and Edward William Gray for the city and District of Montreal. Two Commissions issued in May 1765 represent a novel use of the form: Joseph Glaude, "A Micmac Indian," was given a

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[57] Quebec Gazette, 4 October 1764.

Commission "to Command such Parties of Indians as may at anytime Depart the Village of Ristigouche for the Purposes of Hunting Shooting or Fishing" and Icannot Jugon was made "Chief of the Indians at Ristigouche" by Commission. No explanation is given as to why British Commissions should have been granted to aboriginal leaders.[58]

These men were the King's servants in the colony, commissioned by His Excellency the Governor, who had received his own Commission directly from the King. Even the Attorneys at Law were commissioned by the Governor. Careful attention was paid to each man's status – whether his name was to be followed by one of the important terms, Gentleman or Esquire. But every householder in the colony was incorporated into the hierarchical structure, each in his proper place.

The personal nature of civil administration in the colony can be seen in a series of letters written by Edward William Gray in 1767 and 1768. Gray was the Deputy Provost Marshal or Sheriff of Montreal and as such was personally responsible for the security of the jail. Two men, Charles Decouagne and William Ellwal, imprisoned for debt, had escaped custody. Although Gray had protested against the condition of the jail, he was being held liable for the debts – in Elwall's case amounting to thirteen hundred pounds. Gray held his post as deputy to James Goldfrap and Goldfrap sought the opinion of the Chief Justice of New York, William Smith, as to whether Gray was liable for these debts. Smith replied:

> In answer to the Question; Whether the Provost Marshal is liable for these Escapes? I am of opinion that he is – the officer must find a sufficient jail at his Peril. His having protested is immaterial, and upon the Trial will not be admitted to be given in Evidence. This is a hardship upon all Sheriffs, but if they were not answerable at all events the mischiefs would be greater; for they might always discharge their prisoners in such a

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[58]Fair Copy of Commissions granted by His Excellency the Governor from the 2 March last to the 21 June 1765 inclusive. PRO CO 42/3: ff. 120-150; Commission to Joseph Glaude, f. 131; to Icannot Jugon, f. 132.

> manner as to render it impossible for Creditors to prove a corrupt confederacy between the officers and the Prisoners.[59]

Although Smith acknowledged the hardship that the principle occasioned, he could see no alternative to the Sheriffs' personal liability for escapes.

Gray wrote to John Morison who was charged with prosecuting him for Elwall's escape:

> I rec'd your kind favor of the 21st Instant informing me of Your having received repeated orders from Colonel Christie to commence an action against me for Elwall's Escape, and that Mr Kneller and the Atty General are concerned with you in this cause, I am very much obliged to you for your friendly and genteel behaviour on this occasion, tho' I was acquainted with it before and I am more concern'd to find that I am deprived of your Assistance in my defence, than I am for the event, having taken very good Opinions on this subject which with many other favorable circumstances induces me to think no Jury will give a Verdict against me, however should I be misinformed no body can blame me for standing Trial and endeavouring to exonerate myself, and I hope you will show me all the Lenity and indulgence in this prosecution you can consist'ly.[60]

Despite his brave words to Morison, Gray was much afraid of the prosecution as he confided to his patron, James Goldfrap:

> I received a Letter from Mr Morison this Post acquainting me with his having received repeated orders from Col Christie to prosecute the Provost Marshal for his Clerks Escape, but seems very favorably inclined towards us, but I much dread the Atty General [Suckling], wish we could have got him on our side for I am afraid he will push matters as far as possible however if as I am told he adores that Idol Gold perhaps a little of it may take off the Edge of his Severity, and I think it would not be a bad Scheme to Offer him a Genteel Fee to plead for the Provost Marshal in case of any future Attacks for Escapes but this I have not properly considered and perhaps it might not be an advisable Step.[61]

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[59]William Smith to Edward William Gray, 13 April 1767, copy of a letter rec'd by Edward William Gray, Gray Letterbooks, NAC MG 23 GII 3, vol 1.

[60]Edward William Gray to John Morison, Esq., 25 May 1767, Copy of outgoing letter in letterbook, Gray Letterbooks, NAC MG 23 G II 3, vol. 1.

[61]Edward William Gray to James Goldfrap, Esq., 25 May 1767, Copy of outgoing letter in letterbook, Gray Letterbooks, NAC MG 23 G II 3, vol. 1.

Gray won his case when the matter came up for trial in September and counted himself very lucky to have done so. Whether any "Genteel Fees" figured in his victory is unknown. Nonetheless, his anxieties were not over. He had written to Goldfrap in August with an estimate of three hundred and sixty pounds for repairing the military prison so that it could serve as a gaol. The Governor thought the expence too great and Gray was unwilling to move the gaol to the military prison without repair. "I do not think it would be proper to take possession of the Military Prison unless it was made good and sufficient...It certainly would if any Escape should happen, be in great measure laid to my charge & I know I should be blamed for making the change."[62]

Gray was also personally liable for failure to carry out the sentences of the court as his letter to Major Skene in October 1767 shows:

> The Robber Lapoint receiv'd Sentence of Death this day and is to be executed on the 28th Inst and as there is Little hope of his being pardoned I must beg you will be so kind as to send me the Negroe Man you promised me for an Executioner by return of the Courier without fail, as I am in the greatest distress for want of a person to do that business & the consequence of its not being done would not only entirely ruin me but the two Gentlemen who are my Security's – When you send him you will please tutor him for the purpose, but keep the matter a secret from every other person, particularly the Couriers, who I have told he is a Negroe I have bought of you, otherwise, so refined are the French People's notions of honour that I do not think I could prevail upon them to suffer him to come along with them, the Fellow therefore must likewise keep his business to himself, and when I have done with him I will either return him to you of keep him entirely and account with you for his value. Your doing me this favour will lay me under the Greatest obligation which I shall ever gratefully remember.[63]

His letter also gives a glimpse of the personal nature of Quebec society. Gray could find no person willing to perform the office of hangman in Montreal and so was forced to

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[62]Edward William Gray to James Goldfrap, 17 August 1767, 31 August 1767, 12 October 1767, 19 October 1767, Copies of outgoing letters in letterbook, Gray Letterbooks, NAC MG 23 GII 3, vol. 1.

[63]Edward William Gray to Major Skene, 3 October 1767, Copy of outgoing letter in letterbook, Gray Letterbooks, NAC MG 23 G II 3, vol.1.

secure an outsider to do the execution. Could any one be more outside the society than a black slave? Another letter, this one to Goldfrap, offers a clue as to why it might have been difficult to secure a hangman from within the community. The "Robber Lapoint" was not someone feared by the community:

> The hangman got up safe however I hope the poor Prisoner will be pardoned, as I think tho he conducted the affairs very artfully that he would not have the Robbery in any other Person than Sombrum, who looked upon was under obligation to his Family & therefore ought to contribute to his relieve, the People in General particularly the French would be glad he was pardoned & as for poor Sombrum if the man is hanged, I am afraid he will not long survive him.[64]

According to community standards, the victim of the robbery, Sombrum, had been remiss in not doing something to relieve Lapoint. Therefore, neither Sombrum nor the people were anxious to see Lapoint hung.

In January of 1768, Gray reported to Goldfrap that the men who had put up the security for the gaoler, who was also personally liable for escapes, refused to continue to do so. The gaoler had let a prisoner escape "out of the door who was in upon an Execution for £110 Lawful." Apparently this time the gaoler had colluded with the prisoner for his escape. Gray asked Goldfrap to contact one Leamy about taking over the position of gaoler, since Leamy could provide his own security.

A ticket for a Lottery for Building a Prison, for the Town and District of Montreal, dated 3 February 1784, is preserved in the National Archives. One wonders if the problem of the gaol in Montreal had to wait until 1784 for resolution. Gray's signature was on the ticket. Gray had tried to resign in 1768, but had been persuaded to continue to execute the office of Provost Marshal until the following year when Goldfrap's agreement with the London patentee expired. He remained in the post for forty years.[65]

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[64]Edward William Gray to James Goldfrap, 19 October 1767, Copy of outgoing letter in letterbook, Gray Letterbooks, NAC MG 23 GII 3, vol. 1.

[65]Neatby, p. 52.

These extracts from his letterbook show very clearly the personal nature of civil administration in Quebec.

It was a society both personal and aristocratic. It may seem odd to term the humble society of Quebec aristocratic. But an aristocratic society always includes a much greater number of humble people than aristocrats. The essential characteristic is that it is hierarchically ordered and that the differences in status and power are deemed to be permanent attributes of the people involved. In Quebec, some were born to rule, others to serve.

Chapter Three - Governing the Colony

Once they were duly sworn, the Governor and Council immediately undertook the task of making rules and regulations for the peace, order and good government of the colony. James Murray enclosed in his letter of 15 July 1765 to the Board of Trade and Plantations a fair copy of "All the Ordinances since the Establishment of Civil Government in August 1764, to the 3rd of June 1765, inclusive." These ordinances (listed in Appendix A) show the scope of regulation that Murray and the Council found necessary to enact as the foundation of the civil administration in the Province of Quebec. Three proclamations were also included in the documents sent to the Board of Trade: a Proclamation declaring free and open trade with the Indians providing that such traders were licensed, and enjoining all to forbear any act of hostility; a Proclamation setting out the terms of land grants, and a Proclamation with respect to customs and manifests.[1] The Minutes of Council also record that "a Publication of most of the Acts relative to High Treason, Petit Treason and Capital Felonies" was presented to the Council and ordered to be translated and published.[2] Taken together, these formed the skeleton of the civil administration in the colony.

This list of ordinances covers almost the entire first year of the province's civil administration and so provides a survey of what constituted civil administration. What did the Governor and Council undertake as their responsibility? Fully fourteen of the twenty-four ordinances and all three of the proclamations dealt, in whole or in part, with trade and commerce: setting standards for weights and measures, setting the price of bread, regulating the market for provisions, establishing the currency, ensuring that people paid their debts, licensing alehouses, regulating carriage and livery rates, providing for the registration of any transfer of land, even regulating fishing practices so that the actions of one did not adversely affect the fishing of another. Of the remaining

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[1]James Murray to the Board of Trade and Plantations, 15 July 1765, PRO CO 42/3, ff. 72-119

[2]Quebec Minute Book, 13 December 1764, NAC RG1 E1 Reel C-85.

ordinances, five related to the courts of law, two of these ratifying the decrees of the military courts prior to the establishment of civil jurisdiction and three to the establishment and procedures of the civil courts. One ordinance declared what would be deemed a due publication of an ordinance. In effect, this ordinance established what would legitimate an ordinance in order that obedience to it would be compelled. Four ordinances related to the troops, two of these setting out the terms of billeting for the troops and a third limiting the jurisdiction of the civil courts over soldiers and seamen in matters of debt – they were not to be prevented from carrying out their duties by imprisonment for debt. The fourth, the Ordinance for better discovering and suppressing unlicensed alehouses had as its main purpose the prevention of the "debauchery" of the troops. The ordinance for the better observing and keeping the Lord's Day seems to be the only one directed specifically at regulating the morals of the community.

The ordinances of the first year of civil administration also reveal that it was difficult to get it right the first time. Five of the ordinances were issued to correct, explain or add to earlier ordinances, generally in response to protest and petitions from the inhabitants. Several ordinances were also struck down by the legal advisors in London whence they were submitted for approval because they were poorly drafted or incompatible with British law.

The Council passed its first ordinance on 3 September 1764, An Ordinance relating to the Assize of Bread and for ascertaining the Standard of Weights and Measures in the Province of Quebec.[3] In order to prevent fraud, weights and measures were to accord with those of the Exchequer of England. Until a set of these weights and measures could be obtained from Britain, those of His Majesty's Customs House of Quebec were to be the standard. The ordinance was more than a simple regulation establishing standards to be followed in the colony. It had to include the mechanism whereby its provisions could be carried out. Setting up these standards entailed appointing someone to assay and mark

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[3]Quebec Minute Book, 3 September 1764, NAC RG1 E1, Reel C-85.

or brand the weights and measures of anyone who sold anything according to such measures. This task was given to the Clerks of the Market who were to procure weights according to the standard and were to mark them with the letters G III R, the King's initials. The clerks were to receive two pence for each assay. The ordinance also entailed affixing penalties – twenty shillings for each offence – for selling goods according to weights or measures without this mark of approval. It also entailed establishing a process for determining such cases – before one of His Majesty's Justices of the Peace of the District where the offence took place. The payment of the fines was to be enforced by a Warrant of Distress and Sale of the Offender's Goods. It further provided for the quarterly inspection of all weights and measures by the clerks and granted the clerks the authority to seize and assay any unmarked weights and measures. The clerks could dispose of such seized weights and measures as recompense for their trouble. If a merchant was convicted of giving less than full measure by the use of nonstandard weights and measures he was to be fined ten pounds. Ten pounds was a substantial fine at a time when it was possible live comfortably in Britain on fifty pounds a year.[4] It was too large a fine to be at the discretion of mere Justices of the Peace, whose jurisdiction was restricted to cases where the amount at issue was less than five pounds or ten pounds where two Justices heard the case together.[5] Therefore, this larger fine was to be recovered through any of His Majesty's Courts of Record. The ordinance also stipulated that this fine was to be recovered "for the use of His said Majesty."[6] In contrast to the provision that the clerks were entitled to the proceeds of the sale of seized weights and measures, "as a Satisfaction for their trouble therein," this larger fine of ten pounds was to be Crown revenue.

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[4]It is notoriously difficult to give direct equivalents for sums of money in the eighteenth century. According to Joanna Innes, historians generally accept that a family could support a middle class lifestyle on fifty pounds a year. Joanna Innes, "Politics and Morals: The Reformation of Manners Movement in Later Eighteenth-Century England," in Eckhardt Hellmuth, ed., The Transformation of Political Culture: England and Germany in the Late Eighteenth Century (London: Oxford University Press, 1990), p. 112. Paul Langford tells us that probably one in five families in England had such an income at mid-century. Paul Langford, A Polite and Commercial People: England, 1727-1783 (Oxford: Clarendon Press, 1989), p. 62.

[5]Shortt and Doughty, p. 150.

[6]Ordinance, PRO CO 42/3, ff. 72-74.

Throughout this ordinance, and this ordinance was not uncommon in this regard, the authority of the King was invoked. It began:

> His Excellency the Governor...by and with the Advice and Consent of His Majesty's Council for the said Province and by Virtue of the Power and Authority to him given, by His Majesty's Letters Patent, under the Great Seal of Great Britain...

The Council is His Majesty's Council and the authority of the Governor is given to him by the King's letters patent. This recalls Murray's Commission as Governor where the King's "meer motion" is cited as the source of the Governor's commission. No suggestion of contract or procedural legitimacy upholds either the governor's authority or the authority of the ordinance. It is personal in nature. The weights and measures that the clerks were to carry about with them were to be marked with the initials of the King, G III R. It was His Majesty's Justices of the Peace who were to determine the minor cases and His Majesty's Courts of Record that were to hear the cases where the fine was larger. This was not just a manner of speaking. The legitimacy of the ordinance and its various provisions was derived from the King's name, from his authority.

The second part of the ordinance dealt with the Assize of Bread. The Assize of Bread was an ancient English law, dating "from time immemorial,"[7] and still in effect in London and many market towns during this period, that provided for the setting of the price of bread sold to the public according to the price of grain. The ubiquitous Justices of the Peace, His Majesty's Justices of the Peace, were given the responsibility of setting this price.

The Assize of Bread was a paternalist measure designed to protect the public, the poor in particular, from the profiteering of millers or bakers. Such a law reflects an idea of a just price – a price for bread at which the poor could afford to live. The moral idea of a just

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[7]According to the Report from the Committee appointed to examine the several Laws now in being relative to the Assize of Bread, presented by Thomas Pownall 21 December 1772, House of Commons Sessional Papers, vol. 25, pp. 95-98.

price stands in sharp contrast to the *laissez-faire* idea of prices being the result of the interaction of supply and demand. The market did not yet rule in eighteenth-century Britain. The moral economy of the English crowd, made famous by E.P. Thompson, referred to this concept of the just price and the customary regulation of the price of bread. Thompson argues that crowd attacks on property were neither random nor capricious. They were, instead, designed to enforce a commonly-held and customary moral code.[8] Walter J. Shelton, in discussing the hunger riots of 1766 in England, tells us that rioters often destroyed stocks of food, "which suggests anger and frustration rather than outright starvation."[9] Both authors note that crowds often forced the sale of provisions at prices they considered "just". Apparently bakers often bore the brunt of such attacks as the poor tended to blame them for the high cost of bread, with some justification according to Shelton. The bakers in turn blamed the brewers' monopoly on yeast and claimed that their profits were restricted by laws based on the lower prices of the 1720s. This may have held some truth prior to 1758 when a new statute permitted variation in either the weight of the loaf while the price remained constant or variation in the price while the weight remained constant. The greater flexibility under the new act created sufficient confusion to permit the bakers and grain dealers to make large profits at the expense of the poor.

In some rural areas of England the Assize of Bread had fallen into disuse; in others, bakers found ways around it – by manipulating the price of grain against which the price of bread was set.[10] However, it was by no means a dead letter in English policy in the 1760s and it formed part of a general understanding of what ought to be the case for much longer. It was in this context that the Quebec ordinance was passed.

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[8]cf. E.P. Thompson's important article, "The moral economy of the English crowd in the 18th century," Past & Present 50 (1971): 76-136.

[9]Walter J. Shelton, English Hunger and Industrial Disorders: a study of social conflict during the first decade of George III's reign, (London: Macmillan, 1975), p. 32.

[10]Shelton, p. 33.

The ordinance set the weight of the sixpenny loaf of wheaten bread at four pounds when the price of wheaten flour was at or under fourteen shillings for 112 pounds, and the weight of the sixpenny brown loaf at six pounds. For the future, three Justices of the Peace together were to set the Assize on the first Monday of the month, according to the "true Intent and meaning of this Ordinance", that is, according to the above proportions as the price of flour varied. The Justices of the Peace were to publish the Assize and the clerks of the market were empowered to visit all bakehouses or to stop any person carrying bread for sale through the streets in order to examine the bread and seize any found under weight. To provide for better enforcement of the regulation, every baker in the province was to mark his bread with the initials of both his Christian name and surname and unmarked bread was to be seized and delivered to the overseers of the poor, "for the benefit of the Poor or Prisoners." If any person disputed such seizure, he could apply for redress within twelve hours of the seizure to a Justice of the Peace who could determine the case. Refusal of admittance to the clerks of the market for inspection of either weights and measures or bread could result in a fine of twenty shillings per offence, recoverable before a Justice of the Peace.[11]

A related ordinance was passed on 3 November 1764, entitled An Ordinance to prevent Forestalling the Market, and Frauds by Butchers &C. The preamble to the ordinance gave the reason for its passage:

> Whereas Quantities of live Stock, fresh Provisions and other Articles, are daily brought from the Country by Land and Water into the Towns of Quebec, Montreal and Trois Rivières; and divers Butchers and other Persons make a Practice of engrossing the same immediately upon the Arrival thereof, to the great Prejudice of the Inhabitants:[12]

The ordinance decreed that all livestock except for oxen and sheep, "all dead fresh Provisions, Grain, Hay, Roots or Garden Stuff" should be openly exposed for sale in the public marketplace between the hours of six and ten in the morning from the first of

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[11]Ordinance, 3 September 1764, PRO CO 42/3, ff. 72-74.

[12]Ordinance, Quebec Gazette, 13 December 1764.

May to the first of October and between the hours of eight and eleven in the morning in the winter season. During this period of time provisions were not to be sold or contracted for in gross; no-one was to purchase any more than was reasonably necessary for the use of his family. Forestalling the market, as buying in gross was called, was regarded as unfair exploitation of the people. Conviction upon the oath of one credible witness before any two of His Majesty's Justices of the Peace would result in forfeiture of the articles bought, sold or contracted for, or the value thereof, half of the goods to go to the informer and half for the use of the poor. Once again the mechanism for enforcement was spelled out in the ordinance. And once again it was His Majesty's Justices of the Peace who were to be the instruments of enforcement. Special provision was made for farmers from the South Shore who, in bringing their produce to market by boat, would find it inconvenient to transport their goods to the marketplace. They were to be permitted to sell from their vessels, providing that they gave notice of their intention to sell by beating a drum or ringing a bell throughout the town, and that they did not begin to sell for one hour after their arrival. The penalty for offending against this part of the ordinance was forty shillings.[13] The ordinance was clear: the function of the market was to distribute food rather than to provide profits. In particular, no middlemen were to rack up profits by buying up goods in bulk and holding them off the market to raise prices.

By 1770, less faith was placed in paternalist measures to ensure provision of the basic needs of the public or the poor. In that year Richard Jackson, legal counsel to the Board of Trade, giving his opinion on the ordinances passed in Quebec in 1768 and 1769, rejected one which compelled bakers to carry on business even when the price of bread was low. Jackson found such an ordinance, "inconsistent with the universal Principles of Trade." It had, he thought, "a direct Tendency to introduce that Scarcity it is intended to prevent, because Plenty may be procured by a Freedom of Trade, but never yet was

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[13]Ordinance, Quebec Gazette, 13 December 1764.

effectually produced in any Country by measures of constraint." It was now the market, unfettered, that would provide for the needs of the poor. Jackson went on to assert:

> If the Bakers in Quebec and Montreal have in unseasonable Weather shut up their shops, it appears to me to have been owing to an injudicious use of the Power of fixing the Assize of Bread: if that be not fixed too low, there will always be Provision against Scarcity, if it be possible to make such Provisions, and if it be not, the best Laws can never obviate the Evil.[14]

The old world of paternalist care for the subject had begun to pass away in favour of the new world of a free market. Forestalling and engrossing were offences of the eighteenth century and earlier. In the nineteenth century, the same practices were deemed the engines of prosperity as capitalism was given free rein. The Duke of Portland wrote in 1800 of the dangers of the people "giving way to the notion of their difficulties being imputable to the avarice and rapacity of those, who instead of being denominated Engrossers are correctly speaking the purveyors and provident Stewards of the Public."[15] In 1801 Portland was extremely critical of reports that farmers had voluntarily entered into agreements to supply markets with corn and other provisions at reduced prices *at the behest of county authorities*. Such a practice, he was certain,

> ...must unavoidably and shortly add to and aggravate the distress which it pretends to alleviate, and I will venture also to assert that the more general it could be rendered the more injurious must be the consequences by which it could not fail to be attended because it necessarily prevents the Employment of Capital in the Farming Line.[16]

Capital invested in farming – in the nineteenth century the invisible hand was to provide for the poor, rather than the hand of the King through the paternalism of His Majesty's Justices of the Peace as in the eighteenth century. Adam Smith's Wealth of Nations was first published in 1776, and the ideas expressed in it shaped the following century. But in

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[14]Opinion, Richard Jackson, 16 July 1770, PRO CO 42/7, ff. 145-146.

[15]Duke of Portland to Dr. Marlow, Vice-Chancellor of Oxford University, 4 October 1800, University of Nottingham, Portland MSS., PwV III, cited in E.P. Thompson, "Moral Economy of the English Crowd," p. 131, n. 147.

[16]Duke of Portland to Earl Mount Edgecumbe, 25 April 1801, PRO, HO 43/13, ff. 24-27, cited in E.P. Thompson, "Moral Economy of the English Crowd," p. 131, n. 147.

1764, the Governor and Council clearly understood their role in regulating trade and commerce to be protection of the poor, the ordinary person – the Canadiens. The need to win the loyalty of the Canadiens reinforced this concern, but it was not unique to the colonial situation.

The second ordinance passed was the "Ordinance for regulating and establishing the Currency of the Province." This ordinance was necessitated by problems that pre-dated the conquest and that had continued under the military regime. New France had been a cash poor colony prior to the conquest. A shortage of specie was not at all uncommon in the eighteenth century, but it been exacerbated in the case of New France by the British blockade of the colony during the Seven Years War. Paper money had been issued by the governor and intendant to meet the expenses of government and to permit commerce in the colony to continue. This paper money was, in effect, only a promise to pay. Before the capitulation of Montreal, while Britain was still at war with France in the colony, both Murray at Quebec and Ralph Burton at Trois Rivières had declared it worthless. After the capitulation of Montreal made the conquest of the colony complete, this strategic measure was no longer necessary or wise.[17] The new subjects would have suffered if the use of paper money had been prohibited. It continued to circulate, though at a steep discount. Much of it eventually ended up in the hands of London merchants who were successful in persuading the British government to insist on its redemption by the French government as part of the peace negotiations in Paris. When the treaty was signed in 1763, a declaration promising payment was also signed. The military governors published this throughout the colony and facilitated the registration of all the French paper in the colony, a condition of its redemption according to the declaration.[18]

Faced with a shortage of currency in the fall of 1759, Murray had considered issuing paper currency himself but decided against it. Instead, he made a public appeal for hard

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[17]Burt, p. 22.

[18]Burt, pp. 48-49.

currency on the 25th of November, offering five percent interest, and was able to raise eight thousand pounds. With the arrival of twenty thousand pounds in May of 1760 at the opening of shipping his immediate difficulties were resolved but he still was short of currency with which to pay the troops. The currency ordinance he issued on 23 November 1759 established the Halifax rate in the colony. Under this rate the Spanish Dollar was to be equivalent to five shillings rather than the four shillings and sixpence which was its equivalent in sterling.[19] This rate remained in effect until the passage of the currency ordinance of the civil administration in 1764.

The coin of various realms circulated in the colony as it did in the other American colonies and in the West Indies. "And Sundry inconveniencies [sic] may arise to the Inhabitants & Commerce of the colony therefrom," as the Minutes of Council put it. Therefore, the Council ordered Thomas Dunn and Hector Theophilus Cramahé on 20 August 1764 to investigate and report on "the most effectual methods of preventing such inconveniencies in future and of regulating one general Currency for the whole Province."[20] The currency ordinance, published 4 October 1764 and to take effect 1 January 1765, set values for the Portuguese Johannes, the Moydore, the Carolin of Germany, the Guinea, the Louis d'Or, the Spanish or French pistole, the Seville, Mexico, or Pillar Dollar, the French Crown, the French piece, the British Shilling, the Pistereen, the French nine-penny piece and British Coppers. Under this ordinance, the Spanish dollar was made equivalent to six shillings. This rate, called the New England rate, could be regarded as a compromise between the lower Halifax rate and the higher rate of the York currency in use in the districts of Trois Rivières and Montreal during military rule. Under the York system the Spanish dollar was equivalent to eight shillings.[21] The

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[19]James Murray to the Duke of Newcastle, 12 July 1760. British Library, Add. MSS. 32908, ff. 223, 224; Burt, pp. 22-23.

[20]Quebec Minute Book, 20 August 1764, NAC RG1 E1, Reel C-85.

[21]Burt, p. 49.

common practice of making change by cutting or clipping coin into smaller pieces was prohibited by the ordinance, "the same being liable to great Fraud and Abuse."[22]

An addition to this ordinance was passed 15 May 1765, to clear up confusion regarding debts contracted before the ordinance came into effect. The addition stipulated that any debts or agreements entered into prior to the first of January 1765 were to be paid "in the Species and Denomination of Money, in the said Ordinance mentioned, as shall be in Value and Proportion to the Species or Denominations of Money of such respective outstanding Debts, Dues and Demands aforesaid, any Thing in the said Ordinance notwithstanding."[23] This clause was intended to clarify a clause in the original ordinance where it was declared that after the first of January 1765:

> the above Species of Coins, or any of them, according to the above Rates, shall be deemed a legal Tender in Payment of all Debts and Contracts, that have, or shall be made within this Province, where there is no special Agreement to the Contrary, drawn up in Writing, or before sufficient Witnesses; and that in all Agreements, Prior to, or since the Conquest of the Province, which have been made in Livres, according to the Method of Computation heretofore in Use, the Livre shall be estimated equal to One shilling of the Currency hereby established, the Dollar to equal to Six Livres, or six Shillings, and in the same Proportion for every coin herein specified.

The value of the British copper half-pence and of British copper farthings were also adjusted by the addition to the ordinance, so that eighteen British copper half-pence now equalled one shilling whereas in the original ordinance, twenty British Coppers were to equal one shilling. According to A.L. Burt, this second ordinance was intended to correct the error of the earlier ordinance which "arbitrarily altered the value of every contract made without reference to any specific currency."[24] The corrected ordinance remained in effect until the Halifax currency was restored in 1777.

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[22]An Ordinance for regulating and establishing the Currency of the Province, Quebec Gazette, 4 October 1764.

[23]An Ordinance In Addition to an Ordinance, published the fourth day of October last "For regulating and establishing the Currency of the Province." Quebec Gazette, 23 May 1765.

[24]Burt, p. 121.

The merchants of Montreal, in particular, stood to lose by the change of currency rates, since they had been operating under the York system. Where formerly a dollar was worth eight shillings, it now was worth only six. The ordinances regarding currency show the Governor and Council attempting to resolve the complex problems of the colony's situation fairly even though it was inevitable in such a situation that some would be made unhappy. The authority of government was necessary to enforce the regulation of the currency, which was necessary for the well-being of the colony as a whole.

The ordinance on weights and measures and the assize of bread dealt with commerce at its most basic level, the small transactions of everyday life. The concern was with fair dealing and the protection of the ordinary person – it was a paternalist measure. The currency ordinances dealt with commerce at this basic level as well but they also affected contracts. Nonetheless, the consideration was the same.

The next two ordinances passed by the Governor and Council concerned the courts, and the administration of justice in the province. The first was passed on 17 September 1764 and entitled, "An Ordinance, For regulating and establishing the Courts of Judicature, Justices of the Peace, Quarter-Sessions, Bailiffs, and other matters relative to the Distribution of Justice in this Province."[25] Clearly, the distribution of justice was regarded as a primary responsibility of government. As the preamble to the ordinance expressed it, "it is highly expedient and necessary, for the well Governing of His Majesty's good Subjects...and for the speedy and impartial Distribution of Justice." The Ordinance first established a superior Court of Judicature, the Court of King's Bench, to sit twice a year in the town of Quebec and presided over by the Chief Justice of the Province. This Court was granted the power and authority to hear and determine all causes, both civil and criminal, according to the laws of England and the ordinances of

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[25]Quebec Gazette, 4 October 1764, Supplement.

the Province. Cases could be appealed from this Court to the Governor and Council where the matter at issue was more than £300 Sterling and from the Governor and Council to the King and Council if the value was more than £500 Sterling. Jurors for this court were to be drawn from the whole colony without any distinction as to where they resided.[26]

The Chief Justice was also to hold a Court of Assize in Montreal and in Trois Rivières once every year, "for the more easy and convenient Distribution of Justice to His Majesty's Subjects in those distant Parts of the Province."[27] Convenient access to justice was one of the benefits to be conferred on the subjects of the colony by the rule of the British King. This provision was later withdrawn because of the lack of sufficient Protestants in those towns to form juries.

In an attempt to adapt the British system of judicature to the colonial situation, Murray and the Council established an inferior court, the Court of Common Pleas, with power and authority to hear and determine all property cases over the value of £10 with liberty of appeal to the Court of King's Bench where the value of the matter in contest was greater than £20. Causes over the value of £300 Sterling could be appealed to the Governor and Council and those over £500 Sterling to the King and Council. Trial in this court was to be by jury if either party requested it, and Roman Catholics were to be allowed to sit on these juries. The Judges in this court were to determine cases "agreeable to Equity, having Regard nevertheless to the Laws of England, as far as the Circumstances and present Situation of Things will admit, until such Time as proper Ordinances for the Information of the People can be established by the Governor and Council, agreeable to the Laws of England." In this court, the French laws and customs were to be allowed and Canadian advocats and proctors could practice.[28] By this means

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[26]Ibid.

[27]Ibid.

[28]Ibid.

Murray and the Council hoped to provide for the needs of the Canadians. The immediate introduction of English law and procedure as promised in the Proclamation of 1763 would have caused hardship for His Majesty's new subjects. This inferior court was intended as a temporary measure to ease the transition for the Canadians.

This Ordinance also formally established the office of the Justice of the Peace and provided for the creation of Bailiffs and Sub-Bailiffs. The second ordinance concerning the administration of justice in the colony, passed 20 September 1764, ratified the decrees of the military courts made prior to the establishment of civil administration in the province.[29] It did, however, provide for appeals to the Governor and Council where the amount in dispute was over three hundred pounds and to the King in Council for amounts over five hundred pounds. This ordinance received amendment in November of the same year, but the only real change was the extension of the period for appeal from two to three months. In a report submitted to the Lords of the Committee of the Privy Council for Plantation Affairs on 2 September 1765 by Lord Dartmouth, Soame Jenyns, John Yorke and J. Dyson, this ordinance was criticized and its disallowance was recommended for the following reasons:

> however necessary it may have been to make some Regulation of this Kind, with a view to prevent Litigious & Vexatious Suits Yet, when we consider the Nature & Constitution of the Courts whose Decrees are thus confirmed & ratified, We can by no Means approve of that Confirmation being extended to Decisions of Matters of Property, to so large an amount as Three Hundred Pounds, And we think that the Time allowed for Appeals in Matters of Property of a greater value is much too limited, Especially as there are none of the usual Exceptions, with respect to Infants, Absentees, Persons non Compos Mentis, or under other natural Disabilities.[30]

Part of the concern with the "Nature and Constitution of the Courts" whose decrees were ratified by this ordinance arose from the lack of legal expertise in such courts, composed as they were of senior military officers. That these critics were themselves

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[29]Quebec Gazette, 11 October 1764.

[30]Report, 2 September 1765, Newcastle Papers, British Library, Add. MSS. 33030, ff. 33-46.

familiar with the law is demonstrated by the precise language of the final objection, where they say that the time within which appeal was allowed is too short. Another part of their concern would certainly have been the danger to liberty posed by permitting the military to have such wide powers over the property of the civilian subject – the eighteenth-century fear of standing armies. This ordinance was not revoked, however, though others were, the two respecting the billeting of troops on householders and the one respecting licensing alehouses in particular.[31] The merchants who had been dissatisfied with the decisions of the military courts were given little room for appeal by this ordinance. They could appeal no amount under three hundred pounds, and the time limit of three months from the proclamation of the ordinance was quite short. Then, the appeal was to be to the Governor and Council, whose sympathies seemed to be with the military – remember, both the Governor and several members of the Council were former officers.

An ordinance made on 3 October 1764 declared what would be deemed a due publication of the ordinances of the province. According to this ordinance, an ordinance would be in force after the public reading of it in the three principal towns of the province, Quebec, Montreal and Trois Rivières, "after Notice by Beat of Drum," and after it had been published in the Quebec Gazette.[32] The Gazette was published in both French and English, but many of the inhabitants of the province could read neither. To address this problem, in March of 1765, the curés of each parish were directed to have the Gazette sent to them weekly and to read to their congregations after church service on Sunday "all such Ordinances and Orders, as from Time to Time shall be published."[33] The Governor and Council turned without qualm to the curés of the Catholic church to fulfil this function. They evinced no concern at this mixing of religious and civil functions.

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[31]Burt, p. 122.

[32]An Ordinance Declaring what shall be deemed a due Publication of the Ordinances of the Province of Quebec. Quebec Gazette, 4 October 1764.

[33]Quebec Gazette, 14 March 1765.

In addition to the ordinances respecting weights and measures, the assize of bread and currency, a number of the ordinances were addressed to the needs of trade and commerce in the province. The Ordinance for Quieting People in their Possessions, and fixing the Age of Maturity, passed 6 November 1764, was an interim response to the uncertainty introduced into the province by the change in rule. Was English or French property law to govern transactions in the province? The two differed in important respects especially with regard to inheritance. The ordinance declared that until 10 August 1765, tenure of lands granted prior to the signing of the Treaty of Paris in 1763 and rights of inheritance in land or property, should remain the same, "unless they shall be altered by some declared and positive law...Provided that nothing in this Ordinance contained shall extend or be construed to extend to the Prejudice of the Rights of the Crown." The age of majority was set at twenty-one.[34]

Several ordinances were made to address the particular problems of debt and credit in a colony at a great distance from both the other colonies and the metropole. They testify to the nature of commerce in the colony. The first requirement was to keep debtors physically present in the colony. The Ordinance, for preventing Persons Leaving the Province without a Pass, required anyone who wished to leave the province to give thirty days notice of his intentions by posting his name in the Secretary's office. His creditors could then "underwrite" his name and he would be required to give security for any unpaid debt before he would be granted a pass. Any ship's master who took on a passenger without a pass was to be subject to a fine of fifty pounds and would be held liable for any damages awarded by the court.[35] A related ordinance addressed the problem of the security for debts being moved out of the reach of creditors. The Ordinance, to prevent the goods and effects of Persons absenting themselves from, or Residing out of this Province, in the Possession of any Merchant, Factor, Trader, Agent,

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[34]Quebec Gazette, 15 November 1764.

[35]Quebec Gazette, 22 November 1764.

Attorney or Trustee, from being taken away, delivered up, Transferred or removed 'till the Debts due and owing by such absentees or Persons residing out of this Province, to any Person or Persons residing within the same, be first paid, or secured to be paid, explains itself in its title. It was a complicated ordinance intended to ensure that debtors who had left the province would not be able to evade the payment of their creditors.[36]

Another touched on the still imperfect process of credit in long-distance trade.[37] The Ordinance for Ascertaining Damages on protested Bills of Exchange addressed the problem of refused bills of exchange. The colony's trade, like that of all colonies, operated on the basis of this financial instrument. The ordinance set a penalty of twelve per cent of the value of the principal of a bill of exchange refused by persons in Europe, as well as a rate of six per cent interest on refused bills. A different penalty rate was set for bills drawn on persons in the other colonies. Here the damages were only four per cent with six per cent interest.[38] The nature of commerce in the province was unstable: it was based on credit, it was risky and it extended beyond the borders of the colony, with debtors moving between Quebec and other parts of the world. By these ordinances, the Governor and Council attempted to reduce the risk as much as possible.

The Ordinance for Registering Grants, Conveyances, and other Instruments in writing, of or concerning any Lands, Tenements or Hereditaments within this Province, passed 6 November 1764, aimed to centralize and regularize the transfer of land and other property. The intended effect of this regulation was to ensure that title to property would be sure and undisputed. The registration of title is a sign of the shift from a society where custom and personal knowledge were sufficient to ensure ownership to a society where bureaucracy and formal law mediate ownership. Owners were solemnly warned by the ordinance to register their property before 24 June 1765. "And for want of such

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[36] Quebec Gazette, 14 May 1765.

[37] See Linda Kerr, "Quebec: The Making of an Imperial Mercantile Community, 1760-1768," for a discussion of the difficulties faced by the merchants in the newly British colony.

[38] Quebec Gazette, 6 December 1764.

Registry, every such Deed or Conveyance shall be adjudged Fraudulent against any Subsequent purchaser for a valuable Consideration." This is a significant statement. Under the provisions of this ordinance, it is registration that makes title valid. Ownership is thereby based on a bureaucratic procedure rather than on any other form of legitimation – long tenure or acknowledged possession, for example. The perceived need for sure title that produced this ordinance, the need of commerce, thus transformed the nature of ownership.

An Ordinance for the better observing and keeping the Lord's Day was passed 6 November 1764, after the first Grand Jury had presented the need for such an ordinance. It is a very stern ordinance. Not only did it prohibit business and labour on the Lord's Day, it also enjoined that no person "use or suffer to be used, any Sports, Game, Play, or Pastime," the penalty to be ten shillings per offence. Tavern-keepers and keepers of public houses were to "keep their Doors shut during the Time of Divine Service," so that people would not be "drinking or idly spending their Time on the Lord's Day." Tavern-keepers would be liable to a fine of ten shillings for each person found "drinking or abiding" on their premises, and the offenders to a fine of five shillings. The Bailiffs were instructed to walk through the towns on Sundays, once in the morning and once in the afternoon, during the time of divine service, to apprehend offenders against the ordinance. The ordinance also declared that, "if any Person or Persons whatsoever, being of the Age of Twelve Years or upwards, being able of Body...shall, for the Space of Three Months together, absent himself or herself from the publick Worship of the Lord's Day, where there are Churches or Places of Worship of their Perswasion [sic]," they would be fined, ten shillings for a head of a family and five shillings for a child or servant. The ordinance assumes that everyone will have a religious persuasion; it simply cannot conceive of an irreligious person. "And all Ministers, Masters and Governors of Families, are hereby strictly required to use their utmost Endeavours, that their Wives, Children, Servants and others under their immediate Government, do not transgress any of the Particulars in this Ordinance mentioned." Both the difference in penalty for a head of a household and his dependants and the specific requirement that such heads of households

do their best to ensure obedience to the ordinance are only understandable in an hierarchically-ordered, paternalist society where the paterfamilias is responsible for the behaviour of his household.

The Justices of the Peace were to be responsible for the imposition of the fines, and in case of refusal to pay, could either sell the offender's goods or commit the offender to jail for a day. The ordinance was to be read publicly four times a year at the opening of Quarter Sessions and on the first Sunday in June and December in all public places of worship.[39] Once again we find religion and public order inextricably linked.

Apparently even this ordinance was not stern enough for someone. A letter appeared in the Gazette addressed to the printers in which the author, Christian the Religious, complained that he had heard some of his fellow citizens boast that they went into the suburbs or the country on the Lord's Day "and there we divert ourselves as we think proper." He lamented that the law was not enforced in the country as well as in the cities.[40]

Four of the ordinances of the first year of civil government related to the presence of the troops within the province. The first to be passed was the Ordinance for the better discovering and suppressing unlicensed Houses. Passed 3 November 1764, it attempted to curtail and control the sale of liquor. The preamble to the ordinance reveals its intentions:

> Whereas there are a great many Persons in this Province who retail Rum, Brandy, Wine, Syder, and other spiritous and strong Liquors, and keep common Tipling-houses; therein harbouring and entertaining Soldiers, Sailors, and Servants, to the Weakning [sic] and Destroying His Majesty's Forces and promoting Idleness and Debaucheries in this Province.[41]

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[39]Quebec Gazette, 20 December 1764.

[40]Quebec Gazette 7 February 1765.

[41]An Ordinance for the better discovering and suppressing unlicensed Houses, Quebec Gazette, 15 November 1764.

Under the terms of the ordinance, only licensed persons would be permitted to retail liquor. Licences were to be obtained from the Secretary of the Province by presenting him with a certificate from the Clerk of the Peace that the applicant had been approved by the Justices of the Peace at the Quarter Sessions and by giving the Secretary "a proper Security for their good Behaviour." The amount of the security was not specified, but the fee was: thirty-six shillings, of which two shillings were to go to the Clerk of the Peace and eight to the Secretary, the remainder to be appropriated to public uses. The penalty for retailing spirits without such a licence was steep – twelve pounds, half of which would go to the informer and half to the Receiver-General. Any one Justice of the Peace, "on his own View, or by Confession of the Party, or by the Oath of one credible Witness," could convict an offender. Refusal to pay could result in confinement in his Majesty's Gaol for two months or until the fine was paid.

The final clause of the ordinance allowed the Provost Marshall of the province or his deputy, constable or bailiff in the company of any Justice of the Peace to enter the premises of a suspect and if the Justice judged the quantity of liquor found there to be more than sufficient for the use of the family to confiscate and sell such liquor, the proceeds to be divided, one half to the government and one half to the Justice and the officers attending him. Refusal of entrance meant a fine of twelve pounds. The potential for abuse of power is obvious, where so much was left to the discretion of the Justice of the Peace who stood to benefit from conviction. Appeal was possible to the Court of General Quarter Sessions. A further clause of the ordinance prohibited the payment of any portion of a worker's wages in liquor. Two exceptions were allowed: merchants could sell liquor without such licence in quantities greater than three gallons, and fishermen could be supplied with "a necessary Quantity of Rum, and other Liquors during the fishing season."[42]

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[42]Ibid.

An amending ordinance was passed 17 April 1765, but its intent was only to stop a loophole that must have been discovered by some merchants. By this ordinance any merchant who sold less than three gallons of spirits to any person was declared to be retailing liquor. Nor could they get around the ordinance by the clever stratagem of selling three gallons of liquor to several persons at once. This was also liable to a fine of twelve pounds. Both these ordinances were struck down in London.[43]

Two ordinances were passed to provide for the housing of the troops in the colony: An Ordinance for Billeting His Majesty's Troops, on Private Housekeepers in this Province, and An Ordinance, for explaining and amending the Ordinance of the 12th Instant, for Quartering His Majesty's Forces in this Province. The first authorized and required the Justices of the Peace, upon application by any officer, to issue a precept to any constable or bailiff to billet the officer or soldier in any private house. Officers above the rank of Captain were to be provided with "a good Bed, Chamber, and Parlour, or other suitable Room in lieu thereof, and one Cellar...intirely for his own Use, with the free Use of the Kitchen thereto belonging in common with the Family." Soldiers were to be provided with "a good Bed and Bedding, with the free Use of the Kitchen Fire, or other Fire for dressing Victuals and warming themselves by in common with the Family." The Justice of the Peace had only two hours to issue a billet after application and bailiffs only two hours to execute the precept. This suggests that the ordinance was intended, in part, to address a problem of reluctance on the part of the Justices of the Peace to give billets. Penalties were also set out for refusing to quarter or for excusing any eligible person from quartering such soldiers or officers billeted upon him or her. No wives, children or servants of officers or soldiers were to be billeted and only civil officers, ministers and curates were exempt.[44]

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[43]One other ordinance relating to liquor was passed in the first year of civil administration. Its concern was also security, but of a different sort. The Ordinance to prevent Rum, and other Strong Liquors being sold to the Indians provided a very substantial penalty of twenty pounds, half to go to the informant and half for the use of His Majesty's government. An interesting exception was made. A licensed retailer of liquor could sell no more than a half-pint per day to each Indian, providing he or she had a permit signed by the Curate or Priest of the parish where he or she resided. Quebec Gazette, 20 December 1764.

[44]Quebec Gazette, 29 November 1764.

The amending ordinance stipulated that each officer would be entitled to one cord of firewood per week during the seven cold months to be furnished by the person upon whom he was billeted, but paid for by the Receiver-General "at the Rate of One mill'd Dollar or Six Shillings" per cord. The Officers quarters were to be "decently furnished agreeable to the Custom of the Country," and were to have a stove or fireplace in each room. Both officers and soldiers were to have the free use of the kitchen fire and the necessary utensils for cooking their meals.[45] Billeting was a contentious issue and continued to be troublesome until barracks were provided, which happy event did not take place until 1766.

The other ordinance that concerned His Majesty's troops in the province was the Ordinance Relating to Soldiers and Seamen, and for preventing Desertion and Imprisonment of their Persons for Debt, or Pretence thereof, and for liberating Soldiers now in Prison for Debt. The preamble to this ordinance which was passed 31 May 1765, explains the problems it was intended to address.

> Whereas it is of great Hurt to His Majesty's Service, that Soldiers, quartered in this Province, should be arrested and restrained in Prison for Debt, or Pretence thereof; and moreover great Loss and Damage is frequently occasioned to Trade and Navigation, by Seamen deserting their Employ or Voyage they are entered upon, or being taken off from the same, by Arrest and Restraint of their Persons in Prison for Debt, or Pretence thereof.

This ordinance treated soldiers, seamen on His Majesty's ships, and merchant seamen together, though not identically. Merchant seamen were no more free to quit their employment than were soldiers or sailors in the Navy. The ordinance first declared that if "any Inn-keeper, Victualer, seller of Wine or strong Liquors, Shop-keeper or any other Person whatsoever" gave credit to any soldier or sailor without the permission of his commanding officer, no writ or process against the soldier or sailor for the debt would be valid. If any were arrested contrary to the ordinance any Justice of the Peace could

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[45]Quebec Gazette, 6 December 1764.

discharge him without fee.The civil administration here acts on behalf of the military because the military's jurisdiction does not extend to civilians. But the effect of the ordinance is to place the good of His Majesty's Service above the ordinary civil law. A clause at the end of the ordinance states that the inhabitants of the province had been frequently warned not to trust or give credit to any soldier in the garrison. In spite of this warning, several people had done so and as a result a number of soldiers were detained in prison at that time, "to the great Detriment of His Majesty's Service." To remedy this problem, any Judge or Justice of the Peace was empowered to discharge any soldier so imprisoned upon complaint by the prisoner or his superior officer.

The second provision of the ordinance declares that if any person should buy, receive as a pledge or exchange any soldier's clothes, arms or accoutrements, or any "Slop-cloaths" from any seaman of the Navy,[46] the buyer or lender would be liable to a fine of five pounds, the soldier or sailor would have his goods returned to him and the buyer or lender would be unable to recover the money given for the goods. The next clause provides that it should be lawful for any one catching a soldier or sailor of the navy selling any of his clothing, arms, accoutrements or slops to apprehend him and return him to the Commander of the Regiment, the Captain of his company or the Captain or other officer of his ship. Together, these provisions of the ordinance give us a glimpse of the ordinary life of the soldier or sailor. The pettiness of the debts contracted, debts to inn-keepers, wine-sellers and victuallers, with the only security offered their clothing, suggests the poverty and precariousness of the lives of soldiers and seamen.

A series of orders issued by General Jeffrey Amherst at the behest of the Treasury in September 1763 after the Peace of Paris was signed shows some of the difficulties of the soldiers' situation. Four pence sterling per day was to be deducted from the pay of each

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[46]Slop-cloaths - the clothing supplied to sailors in the navy.

non-commissioned officer and private soldier to defray the costs of the provisions they received.[47] Amherst did not regard this as a great hardship:

> Considering the Several Advantages a Soldier may have in this Country by cultivating some Ground where he may happen to be Quartered, or Providing himself with Fish, Game &ca, I must confess I do not look upon the Hardship of this Stoppage so great as it appears to be at first View, as the men may for the most part, Do very well with Four rations for Eight Days [so that their pay will be reduced by two pence per day rather than four].[48]

In October, however, a new order was issued reducing the stoppage to two pence halfpenny because soldiers could not supply themselves at the former rate because of the high price of "necessaries".[49] Later the same month Amherst authorised payment of ten pence per day to soldiers for extraordinary work such as building fortifications, "in consideration that soldiers pay for their own provisions."[50] Though they were still under orders, the soldiers were at least partly responsible for their own subsistence in peacetime.

The second half of the Ordinance concerned seamen. It laid a substantial penalty of twenty pounds on any ship's master or commander who shipped a seaman that had first shipped on another ship. Half the fine was to go for the use of His Majesty's Government, and half to the informant. Any seaman who so shipped himself forfeited a month's wages to be divided in the same way as the fine. Any person enticing a seaman to desert or harbouring, concealing or assisting a deserting seaman was likewise liable to a fine of twenty pounds. Any seaman, having shipped on board a particular ship (by signing the shipping articles), who then refused to serve, could be imprisoned by the

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[47]Jeffrey Amherst, General Orders and Letters relating to the Garrisons of Niagara, etc. 9 September 1763. British Library, Add. MSS. 21678, ff. 19 - 20.

[48]Ibid., ff. 20 - 21.

[49]Jeffrey Amherst, General Orders and Letters relating to the Garrisons of Niagara, etc. 11 October 1763. British Library, Add. MSS. 21678, f. 31.

[50]Jeffrey Amherst, General Orders and Letters relating to the Garrisons of Niagara, etc. 29 October 1763. British Library, Add. MSS. 21678, f. 32.

Justice of the Peace in order to compel him to serve as he had agreed to do.[51] No distinction was made in this part of the ordinance between seamen on merchant ships and seamen on His Majesty's ships.

The ordinances relating to troops in the province reflect the particularities of the colonial situation. Security was an ongoing concern so the troops were a necessary evil. It was difficult to reconcile the requirements of the army with civil administration. Murray was exasperated by the lack of understanding shown in London. Defending the Ordinance for suppressing unlicensed alehouses, he wrote:

> By the ships lately arrived we are told the people of London find faults with the Ordinance which allows the Justices to search for spirits upon reasonable suspicion, its probable those Gentlemen are ignorant of our situation and of the necessity of extraordinary efforts to prevent the Debauchery of the Troops, Nobody here has complained of this Ordinance, it has never been enforced, the possibility of enforcing it, has hitherto made it unnecessary, besides the Ordinance is not without a precedent which has the Royal Approbation, for in Nova Scotia that very Law is of four years standing and by my instructions I am directed to give particular attention to the Laws of that Province.[52]

General Murray was not willing to risk the security of the colony to protect civil rights. But the ordinances regarding billeting and unlicensed alehouses were eventually struck down in London. It was to be a civil administration in Quebec, not a military administration under a civilian facade.

It was not a simple task to erect a civil administration for the colony of Quebec. The scope of the regulation encompassed by these ordinances of the first year of civil government is sufficient to demonstrate the complexity of the task undertaken. Each ordinance had a practical function but they all shared a larger function – that of rendering the new government legitimate in the eyes of His Majesty's subjects, both

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[51]Quebec Gazette, 6 June 1765.

[52]James Murray to the Board of Trade, 24 June 1765, PRO CO 42/53, f. 277.

ancient and new. Here it is not the ritual that clothed them but the content of the measures themselves that was intended to legitimate the civil authority.

Chapter Four- The King, Your Father

In April of 1777, during the war with the American colonists, Guy Carleton, Governor and Commander in Chief of His Majesty's Forces in Quebec, wrote to Captain Fraser in response to his report on a conference between the Oneidas and the Indians of Cachnawage. The Governor instructed Fraser to deliver a message to the Oneidas. First, he was to inform them that the Governor knew who they were and that they were "Emissaries from and in the pay of the people in rebellion against their king." He knows that their nation has been the only one to support the traitors, but he sympathizes with them because he is convinced it was fear that caused them to act in this contemptible way:

> no Nation of Indians is so insensible to Morality, as not to feel the heighnousness of the crime of taking up arms against the king their Father;– no nation of Indians so blind to their own Interest as not clearly to see, that he alone can protect them from the Oppression of those Rebels, and supply them with all they want; It is therefore that their Father pitys very much their miserable Situation, which throw's them at the mercy of those contemptible Traitors and Compells them to serve as mouths for those Rebels, for the Language they utter is the Language of Rebellion: as the Oneidas seem to plead ignorance of the manners of the White people, their Father tells them what they are, and begs them to listen attentively.

Thus, Governor Carleton expressed the paternal care of the King for his people. But the King's paternalism had another side:

> To take up arms against their King is death, not only by the Laws of the English, but by the laws of every nation whatever; – to be aiding and assisting people in arms against their king;– to serve as emissaries to, or be the least in communication with such people is death by the same laws, unless it be by express permission of their Father.– It is very true their Father has spared the shedding of their blood, as much as possible, in hopes to restore them to a proper sense of their duty and obedience, but he is greatly afraid that the time must come when a different conduct must be observed towards them: And their Father desires the Oneidas will never forget how much Lenity and mildness has hitherto been observed towards those ungratefull people which has only rendered them more insolent and wanton than before; and that, if their blood should be spilt in

> large quantities, they will bear witness to one another, that it was because they could not be reduced by gentler methods to a due sense of their duty.[1]

Because of their difficult situation in the midst of the rebels, their Father expects them only to remain quiet and to refrain from aiding the rebels. Governor Carleton closes his letter with a postscript to Fraser recommending that he treat the Oneida messengers civilly and if they should be in want of any thing to give them whatever he thinks proper. This remarkable document expresses in very clear terms the paternalism that underpinned the eighteenth-century British constitution. Because the message was intended for the Oneidas, it is more explicit than if it had been meant for European ears. The phrase, "the King your Father," is used more often than it might have been in writing to other subjects of the King, but it is not merely a rhetorical device used with the Indians. The American colonists were contemptible in Carleton's eyes precisely because they were in rebellion against the King, their father. Eighteenth-century paternalism seems to have been a very stern paternalism. The Oneidas were to be treated with fatherly concern, but if they took up arms against the King, their father, they would merit death. "No Nation of Indians is so insensible to Morality, as not to feel the heighnousness of the crime of taking up arms against the king their Father." Carleton's insistence that this is a natural law, common to all nations, is testimony to his unquestioning acceptance of the idea that the King is father to his subjects and that they owe him submission. The model of the polity to which he refers is that of the patriarchal family.

Other references to the King's paternal relation to his subjects confirm that this was not merely a rhetorical flourish nor a conception used only in dealings with the Indians.[2] The Proclamation of 1763 mentioned it:

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[1]Guy Carleton to Captain Fraser, 7 April 1777, British Library, Add. MSS. 21699, ff. 99, 100.

[2]Richard White, in his important book, The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815 (Cambridge: Cambridge University Press, 1991) makes the argument that Indians and Europeans established a middle ground, "a common mutually comprehensible world," (p. ix.) in which the Europeans had to

> And whereas it will greatly contribute to the speedy settling of our said new Governments, that our loving subjects should be informed of our Paternal care, for the security of the Liberties and Properties of those who are and shall become Inhabitants thereof.[3]

In a letter written in 1764, Colonel Frederick Haldimand commended Murray's efforts to ensure that the King's goodness towards his new subjects was known to them. They should not be left ignorant of the care His Majesty had taken for their interests, and he, Haldimand, intended to publish a placard to that effect. This advertisement of the King's goodness to his new subjects was, of course, part of a strategy of legitimation. But this letter, written from one military governor to another, reflected Haldimand's understanding of the King's role.[4]

The newly appointed Secretary of State, Lord Hillsborough, wrote to the Lieutenant Governor of Quebec, Guy Carleton, in 1768 with respect to recommendations Carleton had made for the colony. His recommendations were "of a very delicate nature," and Hillsborough doubted if they would be dealt with soon. "In the mean time His Majesty desires that His Canadian subjects should be assured of His gracious Disposition to give them every Mark of His Royal Protection that they can reasonably hope for or expect."[5] The colonists were to wait patiently, secure in the knowledge of the King's protection.

A little later in the colony's life, Governor Carleton wrote to Hillsborough, concerning a petition of some colonists:

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accept and use the Indian idea of the chief (or king) as father to his people. Though the idea had different meanings for the two groups, it is my contention that the British were familiar with a paternalist concept of kingship, and that this made it possible for them to use the language of the king as father on the Middle Ground. The British conception of fatherhood was far more authoritarian, far sterner than the Indian, however.

[3]Shortt and Doughty, p. 120.

[4]Frederick Haldimand to James Murray, 17 February 1764, British Library, Add. MSS. 21666, f. 136. English paraphrase by the present author.

[5]Lord Hillsborough to Guy Carleton, 6 March 1768, PRO CO 43/8, ff.1-5.

> When last at Montreal the rough Draft of a Memorial to the King for the Reestablishment of the ancient Laws of the Country, and for some Alteration in the Administration of Justice, was communicated for my Approbation, but as I understand the King's Intentions are to grant those very Corrections and Improvements for which they mean to Petition, and it is far more eligible that these should take their Rise from His Paternal Attention to their Interests, than proceed from any Sollicitations on their Part, I took Care to get the same quashed.[6]

Why was it better for the corrections and improvements to be made without the colonists petitioning for them? It was preferable that such benefits be regarded as the gracious gift of the King to his subjects – the King's Paternal Attention fostered loyalty to the government. It would not do for the subjects to begin to think of reforms as their own doing or as their right. They were, rather, boons granted to his loyal subjects by their fatherly King.

Hector Theophilus Cramahé, then Lieutenant Governor of the colony in Carleton's absence, used the same words in July of 1771 in a letter to Hillsborough respecting the long-delayed constitutional settlement for the colony:

> The Canadians as eagerly wish for a Settlement, so very interesting for them in every Respect, they are thoroughly impressed with the just Reason they have to rely upon His Majesty's Paternal Care and Attention towards them, and this is their chief Comfort and Support, under the many Obstacles and Difficulties, that have, they find, hitherto retarded the completion of this important Business.[7]

The concept of the King's paternal care was not unfamiliar to the Canadiens. For example, Father Morisseaux, a Catholic priest in Quebec, applied to Murray for a renewal signed and sealed by the King of a grant of the Post of St. Augustine now under the jurisdiction of Newfoundland. In his memorial he stressed the need of the widows and orphans in his care and appealed to the king as "pere et Protecteur de la veuve et de

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[6]Guy Carleton to Lord Hillsborough, 7 August 1769, PRO CO 42/7, ff. 117-118.

[7]Hector Theophilus Cramahé to Lord Hillsborough, 31 July 1771, PRO CO 42/8, ff. 41-42.

l'Orphelin"[8] Murray renewed his grant for one year and transmitted his memorial to the Board of Trade, saying:

> I could not refuse Monsieur Morisseaux, a charitable Priest in the neighbourhood of this town, who during the times of misery and distress of this Province, has maintained out of a very moderate income three or four unfortunate Families, the Favour of transmitting a Memorial relative to the Post of St. Augustine.[9]

It seems to have been particularly the Indians and the Canadians, His Majesty's new subjects, who were recommended to the fatherly care of their King. They were subjects only, dependent on the King for protection. Their duty was submission. They were not expected to participate in their own government; as Carleton's action in quashing the memorial clearly shows, they were, in fact, actively discouraged from doing so.

The necessary obverse of the King's paternal attention was patient submission, a quality that the merchants were sadly lacking. Instead, they took their stand on their rights as freeborn Englishmen, demanded an assembly and challenged the legitimacy of the rule by Governor and Council. It is little wonder, then, that Murray, Carleton, Cramahé and Haldimand regarded them as factious, disreputable men. They challenged the conservative social and political structure that the governors were attempting to create in the colony. They did so, in part, because they did not share the assumptions held by the elite about the nature of the polity. They saw themselves as citizens of a state, entitled to participation in their own governance, rather than as mere subjects of the King. This is a very different understanding of the polity than that held by the Governors. As Rodney Barker argues in Political Legitimacy and the State, all citizens are subjects, but not all subjects are citizens. Subjects see themselves as being governed, rather than playing a part in shaping that government. Citizens, by contrast, engage in politics and thereby

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[8]Memorial, Jean Baptiste Laurent Morisseaux to James Murray, 18 July 1764, PRO CO 42/ 1, ff. 388v-389.

[9]Governor James Murray to the Lords Commissioners of Trade and Plantations, 25 August 1764, PRO CO 42/1, f. 387.

legitimate as well as influence government.[10] It is, however, a more conditional form of legitimation than the legitimation of the relationship between a subject and his King. The duty of the subject is submission because the King's rule is legitimated by his divine ordination, or by conquest, or by tradition. The citizen may withdraw his submission if he regards the government as having failed to live up to its obligations. This much more contractual model of political relations is closer to the understanding the merchants held of their position in the state, than the model of subjects of the King.[11]

The Presentments of the Grand Jury of 16 October 1764 were the first major challenge to the administration. A.L. Burt and Hilda Neatby seem to dismiss them, attributing them to the agitation of one or two private individuals: George Allsopp, a merchant of Quebec, motivated only by his hatred of the military and of Murray, and Williams Conyngham, a lawyer, whom Neatby terms "an incorrigible mischief-maker."[12] But the Presentments deserve to be taken seriously as indications of the political thinking of the merchants, even if the claims they made were not politically viable at the time. I do not mean by this to revive the old myth of the merchants as the vanguard of democracy. They were not. Nonetheless, they held significantly different conceptions of the political and social order than the governors, and the Presentments are the first real glimpse of them after the establishment of civil government.

The Presentments are a mixed bag of recommendations and complaints, as indeed they were meant to be. Grand Juries were meant to be an inquest into the state of the community, reporting on crimes, certainly, but also on administrative problems and

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[10]Rodney Barker, Political Legitimacy and the State, (Oxford: Clarendon Press, 1990), p. 3.

[11]According to Gordon Schochet, "Patriarchalism...treated status as natural and supported authority and duty without reciprocity. The contract emphasized the conventional sources of status and ultimately led to limits on authority and the reciprocity of rights and duties." Gordon J. Schochet, Patriarchalism in Political Thought (Oxford: Basil Blackwell, 1975), p. 83.

[12]Burt, Quebec, pp. 111-112; Neatby, Quebec, pp. 37-38.

other concerns. The Grand Jurors of Quebec first complained that the inferior courts established in the Province were "tiresome, litigious, and expensive to this poor colony, as they very often must be attended with the disagreeable Necessity of Appeals, & of course many exorbitant Fees." The courts to which the merchants here refer were those established by the "Ordinance For regulating and establishing Courts of Judicature, Justices of the Peace, Quarter-Sessions, Bailiffs, and other matters relative to the Distribution of Justice in this Province" of 17 September 1764. The inferior courts to which the Grand Jurors objected were the courts of the Justices of the Peace and the Court of Common Pleas which had been set up to serve the needs of the Canadiens.

The second complaint was of the great number of Justices of the Peace appointed out of so few men legally qualified. The next Presentment expands on this. It is a waste of time to attend a court where the judge is not qualified to explain the law and "sum up the evidence to the Jury, to prevent it's being misled by the Barristers," the Grand Jurors contend. Together these two complaints indicate that the Justices of the Peace were not substantial enough in the eyes of the Grand Jurors to command their respect. Nor were the Judges appointed to the Court of Common Pleas, Captain John Fraser, Adam Mabane, and Francis Mounier. None of the judges had any legal training, but it is hard to see what the alternative might have been.

The Grand Jurors next describe the practice in the colonies to the south where, they say, juries were not called unless the Chief Justice presided. Taken with the previous presentment, this article shows a wariness of juries themselves. In the southern colonies, "neither the Lives nor Liberties of His Majesty's Subjects, nor any Property above the value of £3 Sterling, are left finally to the Decision of the Justices of the Peace," they claim. Once again the Grand Jurors display their dissatisfaction with the power given to the Justices of the Peace. However, after outlining the system of courts in the southern colonies, the Grand Jurors state their opinion that "from the present State of this

Colony," it would suffice to authorize any three Justices of the Peace to determine cases where the value was not greater than ten pounds, without either jury or appeal.

They next complain that the proliferation of huts and stalls in the marketplaces provide "Nurseries for Idlers," who would otherwise be employed in useful occupations. It sounds like the merchants were facing a labour shortage. Permitting the King's batteries, docks and wharves to fall into private hands was next represented as a great grievance. However, their sincerity may be doubted here since one of their number, the foreman, James Johnson, had petitioned to be allowed to purchase some of this property.[13]

They next recommend the enforcement of the Laws c England regarding Sabbath observance for which the acquisition of "a learned Clergyman of a moral & exemplary life, qualified to preach the Gospel in it's primitive purity, in both Languages, would be absolutely necessary." At first, it might seem odd that they included a complaint and recommendation like this in their list of grievances. But it does fit with their understanding of the polity. Like the governors, the Grand Jurors saw religion as necessary to the proper government of the colony. They could not envision a secular state. Because Catholicism was synonymous in their minds with tyranny, they were adamant that the church to be established be the Church of England, not the Church of Rome. This is not stated explicitly in this recommendation, perhaps because of the necessity of securing the signatures of the Canadien Jurors. The meaning would not be lost on the governor or the British authorities, however. Strict Sabbath observance was a particularly Protestant position, and the description of the necessary clergyman evokes the common criticisms of Catholic priests. He is to be learned rather than ignorant, as the priests were regarded. He is to lead a moral and exemplary life, as opposed to the lives priests were generally supposed to lead according to Protestant bigotry. Most

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[13]Burt, Quebec, p. 112.

important, he is to "preach the Gospel in it's primitive purity," that is, without the accretions and corruptions of Catholicism.

The next two Presentments were the most extreme: the Grand Jury proposed that, since they themselves constituted the only representative body in the colony, they should be consulted before any ordinance was made law and that they should also inspect the public accounts twice in the year. They here proposed that they act as the Assembly of the colony. There is more than a little irony here. Claiming their rights as British subjects to a representative Assembly, they proposed that a non-elected, self-appointed body take on the powers of that Assembly. But before we hastily dismiss this proposal as only the self-serving bit of business it undoubtedly was, let us consider what it might suggest. The important aspect of the Assembly in their eyes, then, was not the procedure by which it was constituted. It could be representative without being elected. It was their interests that were being ignored or overruled in the administration of the colony and they were determined that this should not be so. From their perspective, the interests of the Canadiens were being well looked after. Too well looked after, in fact, as an additional section appended to the Presentments, signed only by the English Grand Jurors and not the Canadiens, attests. It read, in part, as follows:

> We therefore believe the admitting Persons of the Roman Religion, who own the Authority Supremacy & Jurisdiction of the Church of Rome, as Jurors, is an open violation of our most Sacred Laws & Liberties, & tending to the utter Subversion of the Protestant Religion and His Majesty's Power, Authority, Right Possession of the Province to which We belong.[14]

The Jurors here appeal to a widely accepted assumption of the British constitution after the Glorious Revolution – that Protestantism is inextricably linked with the legitimacy of the King's rule. This section also renders the earlier wariness of juries more understandable and fits perfectly with the recommendation regarding Sabbath observance and the need for a Protestant clergyman. Roman Catholicism is a grave

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[14]Presentments of the Grand Jury of Quebec, 16 October 1764, British Library, Add. MSS. 32982, ff. 16-20.

danger to the liberties enshrined in the British Constitution. The additional section also complained that the appointment of so many military men to the office of Justice of the Peace was unconstitutional and that only necessity could excuse "such an unwarrantable Encroachment on the Established Maxims of a British Government."

The Grand Jury further recommended the amendment of two ordinances of the Governor and Council, the ordinance confirming the decrees of the military courts and the ordinance establishing the Courts of Judicature. The first, they said, could be amended by allowing an appeal of the decisions of the military courts to the now-established civil courts where the value of the matter at issue exceeded ten pounds. The second, they claimed, was both grievous and unconstitutional. Presumably the participation permitted to Roman Catholics in the Court of Common Pleas is the grievance to which they here refer.

The thirteenth presentment is a mostly innocuous one with a sting in its tail. It asserted the need for proper regulations regarding carts and carriages, the measurement and quality of firewood, keeping the public streets clean, sweeping chimneys to prevent fire -- all mere matters of minor consequence and very much the sort of thing with which a Grand Jury would normally concern itself. The next clause, that regulations were wanted for establishing a public Protestant school and a poor house, was more important. Not that Grand Juries did not deal with this sort of thing. They did. But of course, the concern here is once again with establishing Protestant institutions, a concern presumably felt only by the English minority.

The last two presentments are very personal in nature. Regulation is wanted for suppressing gaming houses, particularly one called the Quebec Arms, kept by John King in the Lower Town, which the Grand Jury claimed to have been informed had been "very particularly countenanced," presumably by the Governor and Council. The Jurors presented the Quebec Arms as a "notorious nuisance, & prejudicial to the Industry &

Trade of this City." Barely veiled criticism of the Governor and Council is evident in this presentment as well as a clear desire to get John King into trouble.

The final presentment is surely the work of George Allsopp, even though he was not a member of the Grand Jury. He had been involved in more than one altercation over the requirement that all persons abroad at night carry a lantern. While granting that the order to carry lanterns was well-intended, the presentment urges amendment of the order to prevent future abuses (neatly implying past abuses), "that regular People going about their lawfull business, without giving disturbance to the public quiet, may not be liable to Imprisonments by Centries, Sergeants or Officers."[15] The air of injured innocence is amusing. Three times in 1764 Allsopp had been in conflict with the guard over his refusal to carry a lantern after dark. Each incident had ended in fisticuffs with the sentry or guard. Allsopp spent one night confined in the guardhouse, and on two occasions prosecuted the hapless soldiers for assault. On one of the occasions he had a lantern in his pocket, presumably unlit, which he produced after wrangling with the sentry.[16] The order had been passed during the military regime, first in 1759, for reasons of security, then again in 1762, at the request of civilians concerned about theft. The issue for Allsopp was the authority of the military over civilians.

Allsopp was behind the Presentments of the Grand Jury, as was Williams Conyngham, the lawyer who was involved in selecting its members. But about fifty merchants signed a public letter of thanks for the Grand Jurors' "very spirited and laudable proceedings," so it seems fair to assume that the presentments had the approval of a significant section of the English-speaking population. On the 26th of October, the Canadien members of the Grand Jury protested at length and in detail that they had not understood what they had

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[15]Presentments of the Grand Jury of Quebec, 16 October 1764, British Library, Add. MSS. 32982, ff. 16-20.

[16]Burt, Quebec, pp. 107-108, 111-112.

signed.[17] Considering the content of the Presentments, it seems unlikely that they would have signed them if they had understood them. Years later, Governor Frederick Haldimand, describing Allsopp as having a "seditious spirit", offered as evidence his instigation of the presentments of 1764, "which brought an Indelible stain upon the old Subjects, & laid the foundation of that jealousy, on the part of the New Subjects which was only done away by the Quebec Act."[18] In 1780, Haldimand only echoed Murray's opinion of the time: that Allsopp was largely responsible for the Presentments, that they were seditious, that they caused serious problems between His Majesty's old and new subjects.

In 1766 Murray refused to permit Allsopp to act as Deputy Secretary, Clerk of the Council, and Clerk of the Inrollments, even though he held a deputation from Henry Ellis for these offices. Explaining his action to the Board of Trade, Murray wrote:

> The Behaviour of this man, from the moment Civil Government was establish'd, became most notorious, it was he who began the dissentions betwixt the Civil & Military, it was he, who, in conjunction with James Johnston, and Eleazar Levy a Jew, stimulated the first Grand Jurors to act as they did, and ever since the uninterrupted business of his life has been to revile at and disturb government, at the expense of Truth, Order and Decency...it is my Duty to declare that nothing but the King's express commands can prevail upon us [the Council] to act with a man, who wantonly and without provocation, has done everything to undignify the Members of Government, which an illiberal licentious Heart can dictate.[19]

There were at least three issues at stake here, the Jurors' claim to the rights of an assembly as the only representative body in the colony, the critique of the governor and council in the presentments and the treatment of the Canadiens by the English-speaking

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[17]Statement by French Jurors in Reference to the Foregoing Presentments, Shortt and Doughty, Constitutional Documents, pp. 156-161.

[18]Extract of a Letter from Governor Haldimand to Lord George Germain, 25 October 1780, PRO CO 42/10, f. 36v.

[19]James Murray to the Lords Commissioners for Trade and Plantations, 14 April 1766, PRO CO 42/5, ff. 195; CO 42/86, f. 186.

Jurors. Any one of these would have made the Jurors unpopular with the Governor. All three tended to erode the legitimacy of the civil administration.

Even though Allsopp secured a glowing testimonial from numerous merchants in Quebec, another from merchants in Montreal, a third from forty-eight French merchants in the province, a fourth from ten Bristol merchants and a fifth signed by four London Merchants and two Members of the House of Commons, he remained in the wilderness until Governor Murray was replaced by Guy Carleton. Even then, he was not reinstated until after a thorough investigation although he had served as Carleton's Secretary in 1759 when the latter was Quartermaster General at Quebec.[20]
The authorities took the presentments very seriously, as an order of the King in Council of 18 October 1765 indicates. The Committee of the Privy Council recommended that:

> directions may be sent over forthwith to the Governor that he may signify your Majesty's highest disapprobation of such their Proceedings and abuse of the good faith of the said French Inhabitants, And that your Majesty's Governor be likewise directed to signify that your Majesty will give the utmost attention to all proper Representations from your Majesty's Canadian Subjects, and will cause to be removed every grievance of which they may have reason justly to complain.[21]

Once again, the King's Paternal Care will remove every grievance but the subjects must act with due submission.

An odd little coda to the incident took place in November of 1764. An anonymous letter received by James Johnson, the foreman of the Grand Jury, was presented to the Council. The Council minutes describe it as a "Scandalous abusive and very infamous Libel". The missive questions whether a certain Governor "should have his Majesty's Favor or not, when his Administration has been with an Arbitrary Disloyalty to the Service; also Monopoly and Exaction has attended his Reign much to the Hurt of the

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[20]"George Alsopp," Dictionary of Canadian Biography, Vol. V., pp. 19-22.

[21]Order in Council, 18 October 1765, PRO CO 42/5, ff. 1-4.

Fair Trader." Johnson had sent the offending letter to the Governor, with the information that the Grand Jury had met to consider the matter and had unanimously recommended that it be suppressed, "as a Piece stuffed with Invective against a dignified Character."[22] One suspects that the Grand Jurors were anxious for some means to redeem themselves in the eyes of the Governor. The Council immediately ordered that a reward of five hundred pounds should be offered for the "discovering & prosecuting to Conviction" of the author. Although an advertisement to that effect was placed in the Quebec Gazette, no further information was forthcoming.[23] In the same issue, James Johnson as Foreman of the Grand Jury placed an advertisement, informing the public that the Grand Jury would pay no attention to any anonymous representations or complaints, "as having a bad Tendency." But this matter was soon overshadowed by events in Montreal, events that were to challenge the newly established civil government far more pointedly that the Presentments of the Grand Jury.

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[22]Quebec Minute Book, 18 November 1764, NAC RG1 E1 Reel C-85.

[23]Quebec Gazette, 22 November 1764.

Chapter Five - Thomas Walker's Ear

As Thomas Walker, one of the newly appointed Justices of the Peace for the District of Montreal in the Province of Quebec, sat at his supper table the evening of 6 December 1764, several armed men burst into the room. According to the deposition of his wife Martha, the intruders were, "armed with swords Blodgeons and other weapons." Martha fled through the kitchen to the cow house from whence she sent the apprentice boy to see what was happening. Returning, he reported, "oh madam my master is all over blood." Martha then ran into the house and found, "Mr Walker sitting upon the Floor so covered with Blood that it was impossible to have known him." She asked her husband, "shall you die," to which he replied, "I believe not get me a surgeon."[1]

Thomas Walker's assailants beat him badly and cut off his ear and part of his cheek. The ear was carried off and thrown onto the table of Lieutenant Synge Tottenham, Adjutant in the 28th Regiment, "for his supper."[2] Thomas Ainslie, sent from Quebec to Montreal to report to Governor Murray on the assault on Walker, described Walker's condition:

> ... as for his Body, it is one continued piece of Mummy beat as if with railles till it is as black as a hatt & so swelled that you barely can know the remains of his face or the Colour of his skin, the quantity of Blood he lost, I have reason to think saved his life, for if it had depended upon his being bled with a lancett, the world could not have saved him.[3]

Who assaulted Walker so violently? Although it proved impossible to bring the perpetrators to justice, the assault was not an act of resistance to British rule by the newly conquered French inhabitants as one might expect. Rather it was the work of British soldiers of the 28th Regiment. Walker had been among the first Justices of the Peace

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[1]Deposition of Martha Walker, 24 December 1764, PRO CO 42/4, ff. 216-217.

[2]Examination of Synge Tottenham before Conrad Gugy, Moses Hazen and Dumas St. Martin, Justices of the Peace, 17 December 1764, PRO CO 42/4, f. 218.

[3]Thomas Ainslie to Governor James Murray, 13 December 1764, PRO CO 42/4, ff. 186-88.

appointed in 1764 as part of the process of establishing civil government in the colony. As the assault indicates, the process did not go smoothly.[4]

Thirteen companies of soldiers were still quartered in Montreal in December of 1764. Because there were no barracks, they had been billeted on the inhabitants since the capitulation of the town in 1760. Billeting soldiers was a kind of tax – those householders who could do so were required to house the soldiers gratis or at very low rates. During military rule billets had been assigned by the army itself; Colonel Gabriel Christie was the officer in charge. Under the newly established civilian government, the Justices of the Peace became the officials charged with the unpleasant duty of giving billets.

A number of conflicts over billets had arisen in the month of November 1764, culminating in a dispute between two of the newly appointed Justices of the Peace: Captain John Fraser, a retired army officer on half-pay, and Thomas Walker, a merchant. It was this dispute that issued in the attack on Walker. Captain Fraser had been appointed Custos Rotulorum, or principal Justice of the Peace,[5] by Governor Murray in hopes of reducing some of the tension inherent in passing from military to civilian government. He had taken on the greater part of the responsibility for assigning billets and had commissioned a census of the available lodgings in the town. By virtue of his new position as Custos Rotulorum, Fraser was entitled to lodging at the Court House; therefore, he vacated the quarters he had been occupying, two upper rooms in a house owned by Mr. Reaume. Two days later, he assigned these quarters to Captain Benjamin Payne of the 28th Regiment.[6]

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[4] Linda Kerr argues that historians have made too mush of the Walker affair and dismisses it as trivial. Linda Kerr, "Quebec," p.96. See her discussion of the tension between the military and civilians, Chapter 4, pp. 88-105.

[5]Custos Rotulorum was the designation given to the principal Justice of the Peace in a county or district; he had custody of the rolls and records of the sessions of the peace.

[6]Captain John Fraser to Governor James Murray, 7 November 1764, PRO CO 42/4, ff. 137-138.

Reaume had as tenant another Justice of the Peace, Francis Noble Knipe. Knipe appears to have regarded Fraser's change of residence as an opportunity to exchange his rooms below for better ones above.[7] His subsequent complaints that Captain Payne threw so much water on the floor that his papers and furniture were ruined suggest one reason that the upper apartment may have been more desirable. Francis Maseres' description of the relatively crude state of ceilings in the colony (even in the better houses) lends weight to this suggestion by furnishing an explanation as to how Payne's ablutions could affect Knipe's apartment.[8] Whatever the reason, Reaume attempted to evict Payne from the rooms vacated by Fraser. Payne refused to leave.

At this point Thomas Walker entered the dispute. Walker was a substantial merchant in Montreal and as such, had been appointed to the first Commission of the Peace. Regarding himself as a leader of men, he had been involved in many of the billeting disputes since the establishment of civil government. At his instigation, a warrant was made out to remove Captain Payne. Because a complainant was required, Knipe made the complaint and the warrant was issued on the grounds that Justices of the Peace were exempt from having soldiers billeted on them. Four Justices of the Peace signed the warrant: Thomas Walker, Thomas Lambe, Jean Dumas St. Martin and John Livingston.[9]

The stories told by the military men and the civilian officials diverge at this point. The military claimed that Payne was put in jail for refusing to give up his room. Walker's letter to Governor Murray says that the bailiff only read the Warrant to Payne:

> & upon Captain Payne's refusal to comply therewith, and saying he would go to Jayl & bidding the Officer shew him the way thither, he

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[7]Thomas Walker to Governor James Murray, 22 November 1764, PRO CO 42/4, f. 163v.

[8]"And there is no plaister to the cielings to cover the bare timbers, so that you may fancy yourself in a cock-loft whenever you happen to look up." Francis Maseres, The Maseres Letters, 1766-1768, ed. W. Stewart Wallace (Toronto: Oxford University Press, Canadian Branch, 1919), p. 43.

[9]Warrants, PRO CO 42/4, ff. 141-142.

> went out of his Room & lockt the door, the officer instead of attempting to remove the Goods, followed him all the way to Jayl, at his Request, without ever having made him his Prisoner, either in word or deed.[10]

Walker believed Payne's actions "proceeded from bad advice given to Capt. Payne & from a precipitate and ill-formed design, to ensnare the Justices, the Ignorance of the Jaylor, & irregularity in the Service of the Warrant contributed to the delusion."[11] Walker sent a message to the Jail that Payne was at liberty to go when and where he pleased but he refused to stir. That evening the jailer was sent to Walker by Brigadier General Burton, Colonel Christie and Captain Fraser to get him to give Payne a written discharge from prison. Walker refused, saying that Payne could do as he liked, presumably because to give a discharge would have been to grant that Payne was in jail at his behest. Captain Payne was offered another billet in the best Tavern in Town.

This foolish dispute is only understandable in the light of the long-standing conflict between the military and the magistrates. Walker later claimed that Reaume had long disputed the right of Captain Fraser to the rooms in question, because he was a half-pay rather than a serving officer. According to answers given by the Justices to a set of questions posed by some of the French inhabitants regarding billeting, half-pay officers were not entitled to a billet, so Reaume was justified in his opinion.[12] However, if Fraser was not entitled to a billet, Captain Payne was. Whether he was entitled to the upper apartment is much less clear. Fraser muddied the waters by linking Captain Payne's entitlement to the apartment to his own previous occupancy of it. In any case, Knipe's complaint in the warrant to remove Payne was not Payne's entitlement to a billet or even Fraser's but that as a Justice of the Peace he was exempt from billeting. True, but Reaume was not exempt from billeting merely because he let other rooms in his house to

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[10]Thomas Walker to Governor James Murray, 22 November 1764, PRO CO 42/4, ff. 163-167.

[11]Ibid.

[12]Citizens of the city of Montreal to the Justices of the Peace of the District of Montreal, 21 October[?] 1764, PRO CO 42/4, ff. 159-161.

a Justice of the Peace. So upon what grounds did the Justices make this claim? Knipe argued that he had a right to the rooms vacated by Fraser – that they were his rooms because he had rented them from Reaume upon their becoming vacant. Whatever the validity of the latter assertion, the warrant itself was disputable, because Payne was not billeted on Knipe but on Reaume.

The fact that the claims and counterclaims did not actually meet each other is testimony to extremely bad state of relations between the military and the merchants. Everything one party did was seized upon as evidence against them by the other. Every action was construed as symbolic of the underlying conflict. Summing up his narrative of the events, Walker wrote:

> I conceive [it] to be nothing less, than a Contention between the Military power & the Civil Authority and a fixt design to do, under the Colour of Law, the most arbitrary Things, which at once would if carried into Effect dishonour Your Excellency's administration & render the People compleatly miserable, for they have supported with invincible Constancy many grievous, partial, and oppressive measures from Col. Christie in regard to the Quartering of Officers and Soldiers.[13]

The set of questions and answers regarding billeting mentioned above suggests that Colonel Christie, in charge of billeting under military rule, had been heavy-handed, at the very least, and that the inhabitants of Montreal had hoped for relief under the new civil administration.[14] The fact that Colonel Christie was reprimanded more than once for using impress warrants to secure labour for his private projects rather than on the public works for which they had been intended, lends credence to the charge that he was arbitrary in his handling of the billeting.[15]

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[13]Thomas Walker to Governor James Murray, 22 November 1764, PRO CO 42/4, f. 165.

[14]Citizens of the city of Montreal to the Justices of the Peace of the District of Montreal, 21 October[?] 1764, PRO CO 42/4, ff. 159-161.

[15]Governor James Murray to Brigadier General Ralph Burton, 9 October 1765, PRO CO 42/5, ff. 74-75; Governor James Murray to Major General Thomas Gage, 1 July 1765, PRO CO 42/4, ff. 238-239. Colonel Christie, later

Walker went on to say:

> the discontent & distress of the People is but too Visible & universal. The Officers in consequence of the Ordinance demand furnished rooms, Wood &c. the Soldiers all want to change their quarters for better houses, & demand feather beds & sheets, sometimes threaten to take the Citizens beds from under them & turn them out of Doors. They take their Victuals from them & sit up all Night carousing & burning their wood & upon the least reprimand threaten to burn them in their houses.[16]

So was Thomas Walker, Justice of the Peace, a champion of liberty, a hero for the people? Certainly by his own account he was:

> I submit to Your Excellency whether this is a time to relax the Judiciary Authority, and beg leave to assure you, Sir, that my feeble Endeavours shall not be wanting to give due force & Vigour to that part of the Laws & Ordinances committed to my charge tho' in so doing I know I expose both my fortune & Person to the ressentment [sic] of a powerful faction, who have already carried it so far as to forbid, upon the Public Parade, all the soldiers from dealing with me under pain of receiving five hundred lashes.[17]

Walker may have been flattering himself but it is nonetheless significant that he made such a claim. That Walker should claim to be protecting the newly conquered Canadiens suggests that he thought this would find favour with the Governor. Note also that he described himself as a defender of the "Laws and Ordinances committed to his charge." He made his stand in the billeting dispute on the rights of the people and on the Laws and Ordinances. He was certainly righteous in his own eyes.

Lieutenant-General Christie, certainly was an ambitious man and rose to a position of prominence in the colony, acquiring two seignories and many other interests. He became acting commander-in-chief of the forces in Canada in 1798. The Maseres Letters, p. 61n.

[16]Thomas Walker to Governor James Murray, 22 November 1764, PRO CO 42/4, ff. 163-167.

[17]Ibid.

Governor Murray had a different view of the conflict between the military and the civil authorities. The affair of Captain Payne's billet, according to Murray, had provided the Justices an opportunity of "wreaking their resentment on the Army".[18] Captain Fraser wrote to Murray declaring that if the Justices concerned were not dismissed, he would no longer act as magistrate.[19] Another officer who had also been appointed Justice of the Peace, Captain Mitchelson, the commanding officer of the 28th Regiment, submitted his resignation as well. Murray, in conformity to his Instructions from the King, refused to dismiss a magistrate without a hearing and full report to the Lords Commissioner for Trade and Plantations in London. The conflict continued. Captain Mitchelson wrote to Brigadier General Burton asking him to intervene on behalf of the officers who were given what they deemed inadequate billets on the orders of Walker and other Justices of the Peace.[20]

One of the Justices, John Livingston, seemed to have a change of heart. Livingston had signed the warrant directing the eviction of Captain Payne but then apparently thought better of it and refused to sign the subsequent one for the removal of Payne's effects from the apartment.[21] He wrote to Murray to justify his own actions by criticizing Walker's. In reply, Walker claimed that Livingston had been intimidated by Colonel Christie. "Mr. Livingston ... had been frightened by Coll. Christie as I've reason to believe for when I entered his house in order to get it signed by him, I caught the latter with uplifted arm, swearing at the Justice."[22] Livingston's change of heart seems to have secured him the favour of the army, for he was put in charge of billeting by Captain Fraser. Walker

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[18]Governor James Murray to the Lords Commissioner for Trade and Plantations (hereafter the Board of Trade), 2 March 1765. PRO CO 42/53, f. 284.

[19]Captain John Fraser to Governor James Murray, 7 November 1764, PRO CO 42/4, f. 139v.

[20]Captain James Mitchelson to Brigadier General Ralph Burton, 21 November 1764, PRO CO 42/4, ff. 144-145.

[21]John Livingston to Captain John Fraser, 6 November 1764, PRO CO 42/4, ff. 144.

[22]Thomas Walker to Governor James Murray, 22 November 1764, PRO CO 42/4, ff. 163-167.

regarded him as "nothing more than wood & Wire, moved by an unseen hand behind the scenes."[23] Finally, Murray summoned all the Justices to Quebec to explain themselves. The assault on Walker took place two nights before his departure for Quebec.

A comparison of the claims made by Captain Mitchelson in his letter to Burton and the set of questions answered by the Justices of the Peace at Montreal reveals the very different assumptions the two groups held about billeting. In Captain Mitchelson's letter, he wrote:

> So many complaints have been made to me as commanding Officer of His Majesty's 28th Regt. from Officers & Soldiers, regarding the usage they meet with from their respective Landlords since the proclaiming the late Ordinance about billeting .... There appears to be a General Spirit amongst the Inhabitants of this Place, stirred up it seems by some Malicious Person, tending to deprive the Officers & Soldiers the Common Allowances of Firewood & Candles, Beds & in short of all necessaries hitherto allowed by every Person billeted upon.[24]

Mitchelson went on to assert that the King's service would suffer from the distress the troops would thereby endure. He asked Burton to make proper regulations to deal with the situation. In his argument, the rightness of the claim of the officers and soldiers to candles and firewood was based on two things: that they were customarily included in billeting and that they were necessary for the good of the King's service.

The questions posed by the French inhabitants of Montreal concerned who was exempt from having soldiers or officers billeted upon them, whether the obligation to billet extended to half pay officers and civilian employees of the military, and how far their obligation to provide billets extended. What did they have to furnish to the officers billeted upon them? Did they have to lodge the domestic servants of officers? How late at

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[23]Ibid.

[24]Captain James Mitchelson to Brigadier General Ralph Burton, 21 November 1764, PRO CO 42/4, ff. 144-145.

night were they required to leave the door unlocked for the convenience of soldiers and officers? The magistrates referred the inquirers over and over again to the Ordinance for answers to their queries regarding their obligations: "Ceux qui doivent loger les Officiers suivant les different grades a quoy sont ils tenu pour les fournitures? The Ordinances explain what is to be done." "Doit-on loger leurs Domestiques & en quel nombre? The Ordinance makes that clear." They treated the Ordinance as the ultimate authority – as though it were a contract.[25]

The conflict between the military and the civil administration in the persons of the Justices of the Peace went much deeper than a petty quarrel over a set of rooms. It represented, in fact, a conflict of fundamental assumptions about the nature of society and its governance. The military referred to a customary obligation and to the King's service as the ultimate authority, although they were not above using the vagueness of the Ordinance to justify expanded claims. The magistrates, merchants by trade, sought to define obligation by reference to contract and to the Ordinance as the ultimate arbiter.

Governor Murray, General Murray until his appointment as civilian governor of the province, had appointed Captain Fraser and Captain Mitchelson Justices of the Peace in hopes of easing some of the tension between the military and the merchants in Montreal. Murray was well aware of the conflict between the two groups and offered an explanation of its source:

> Our Army here is composed of those who conquered the Country, and who had governed it for five years. The contempt which Military Men have ever entertained for Mercantile people must have been greatly increased in the Colony from the Circumstances of it. The genteel people of the Colony despise Merchants and of course esteem the Officers who shun them most, on the other hand our Merchants are chiefly adventurers of mean Education or if old Traders such as have failed in other Countrys, all have their Fortunes to make, and little sollicitous about the means

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[25]Citizens of the city of Montreal to the Justices of the Peace of the District of Montreal and Answer, 21 October[?] 1764, PRO CO 42/4, ff. 159-162.

> provided the end is obtained, such Men are by no means proper to lessen the Prejudices which Military Men naturally have for their profession. As Vanity is equally powerful and perhaps more universal then avarice, the Merchants hate those who despise them.[26]

A military man himself, Murray shared the prejudices of the other officers against the merchants, but as civilian governor, he was under the necessity of using them as the instruments of civil government. He lamented bitterly the difficulties of erecting a civil government where all those eligible to serve were mere passengers through the colony, rather than the landed men, who, he believed, ought to form the government.[27]

The legitimacy of the office of Justice of the Peace in England had once been based on the personal prominence of the appointees, who were drawn from the chief residents of a county. This had begun to change, as it became necessary to expand the Commission of the Peace, but there was still great concern that the Justices be substantial enough to command respect. By the end of the eighteenth century the office derived its legitimacy from the law itself and conferred dignity on the appointees. But at mid-century the officers of the military found it difficult to accept the legitimacy of the Quebec Justices even though they had been duly appointed and commissioned because they were not men who could command their respect in their own right. Because military commission was a matter of patronage and purchase, most officers would have been gentlemen, while the merchants were not.

Other reasons may be adduced. Disputes between the merchants and the army had been frequent under military rule and had been settled by Courts Martial. Under the new civil administration, disputes were to be settled by the magistrates, drawn from the very merchants with whom the military had had such conflict. This turning of the tables was bound to be unsettling.

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[26]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53 f. 281.

[27]Governor James Murray to PRO CO 42/1, ff. 392-393.

A further factor in the tension between the military and civil authorities was the friction between Brigadier General Ralph Burton and Governor James Murray. This was partly the result of the conflicting lines of authority and precedence in the colony. Burton was the military governor of Montreal. As before noted, Murray regarded Burton's situation as difficult:

> Coll. Burton who had aimed at the Government of the Province and refused the Lieut. Government, is appointed a Brig[adier] on the American Staff and remains to command the Troops of Montreal. It is not natural to expect that a Man will be contented with the command of a few Troops in a country he had so long governed without controul.[28]

Murray thought his own position even worse. He had been shocked to discover that his commission as governor did not give him command over the troops in his Province. Thomas Gage and Ralph Burton, military lieutenant governors of the districts of Montreal and Trois Rivières under Murray's military governorship, now declared that he "could have no Command over the Troops in their respective Districts." When Gage became Commander in Chief of the Forces in America, Burton was advanced to the command of the troops at Montreal. Murray was offended by the promotion of a junior officer over his head, a point upon which he, in common with other officers of his day, was touchy. More importantly, he felt the administration of the colony would suffer by the uncertainty over jurisdiction:

> It must be allowed that without a Military fforce [sic] this lately Conquerd Province cannot be Govern'd, there doeth not exist in it above One hundred Protestant Subjects exclusive of the Troops. And by my instructions of these hundred Protestants must be composed the Magistracy, But what Force, what weight, can such a Magistracy have, unless the Supreme Magistrate has the disposition of the Military Force; for if he has not, it is to be apprehended that the People will be oppressed by the Soldiery, that the Civil Governor, and his Officers, will become Contemptable, and in place of being the means of preserving order, and promoting the happiness of the Subject, they may from the Natural

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[28]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53, f. 282.

> Jealousy that such an Establishment will produce become the bane of Peace, As the weak efforts they will of course make in Support of their Authority, can be productive of Nothing but Vexation, and Confusion.
>
> The Canadians are to a man Soldiers, and will naturally conceive that he who Commands the Troops, should govern them; I am convinced at least it will be easyer for a soldier to introduce and make palatable to them Our Laws, and customs, than it can be for a Man degraded from the Profession of Arms.[29]

According to Murray's argument, then, the Magistracy (the Justices of the Peace), derived its legitimacy in part from the Governor, "the Supreme Magistrate." But if he did not have the military command neither he nor the magistrates he appointed could command the necessary respect of the people – because he would not be able to control the soldiers who would oppress the people. In this situation, whatever efforts they were to make to assert their authority would only make for unrest and confusion. The attack on Walker seems to show that Murray was accurate in his assessment of the situation. The legitimacy of the civil administration was seriously threatened by the civil governors' inability to control the military.

Murray did not seek to be upon the American Staff, he asserted. "All I plead for is the necessity of having the Disposition of the Troops destined for the Security of the Province intrusted to my care, that they may pay me the usual Complements, and receive from me the Parole."[30] His pleas and his prophecies were not regarded and the military command was not reunited with the civilian governorship until Guy Carleton was sent out to take Murray's place.

Murray's plea for at least the appearance of military command is revealing, both of his insight into the structure of governance and authority in the colony and of his assessment of the Canadiens. The authority of the Justices of the Peace was threatened, not by the

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[29]Shortt and Doughty, pp. 152-153.

[30]Ibid.

recalcitrance of the Canadiens, but by the opposition of the military. In this assessment, Murray named the threat to civil administration as the oppression of the people by the military which he feared the Justices of the Peace would not be strong enough to avert, if he were not invested with authority over the troops. Nor would he be able to gain the necessary respect from the Canadiens if he were stripped of his military authority. He argued that the legitimacy of British rule would be easier to establish if the Governor had control over coercive force in the colony. He sought to speak in the language of legitimacy to which the Canadiens were accustomed.

Both Murray and Burton were protective of their jurisdiction and anxious that no fault should attach to them for problems that arose in the colony. The tension was further exacerbated by the fact that Murray did not hold Burton in esteem. His opinion of the Brigadier did not improve during the time they were forced to work together. Writing to Frederick Haldimand in 1766, he commented that Burton left the District as much hated as Haldimand was admired. His comment that "after so long a persecution & such a series of confusion, the cause being removed, we should now enjoy the sunshine of Peace and order,"[31] suggests that Murray held Burton as least partly responsible for the strife in the colony.

Further tension arose between the military and the merchants because it was unclear whether military courts could have jurisdiction over civilians in time of peace. This resulted in at least one lawsuit against the military in Montreal, with General Burton, Colonel Christie and other officers named as respondents. A.L. Burt in his Old Province of Quebec cites the case of Eleazar Levy, where Levy's refusal to acknowledge the jurisdiction of the military court resulted in a judgement by default in favour of Lieutenant Daniel Robertson. Levy was the agent of the assignees in a case of bankruptcy; Robertson was owed money by the bankrupt. Levy refused to pay and

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[31]Governor James Murray to Colonel Frederick Haldimand, 21 April 1766, British Library, Add. MSS. 21666, f. 206.

Robertson secured an order for seizure from Governor Burton, which was improperly executed against Levy's goods while he was out of town. Since it was illegal to seize his goods in his absence, Burton reversed the judgement and ordered the goods to be returned. Levy refused to accept delivery of the goods because he sought damages as well. Following the establishment of civil government, he successfully sued Burton, the town major, the provost marshall and Robertson. After appeal and counter-appeal lasting until 1771 and reaching to the privy council in London, Levy was vindicated. However, he was unable to collect what was due him as the bond posted by the defendants had been returned in error and destroyed. The incident is illustrative of one of the causes of the friction between the civilian population, particularly the merchants, and the officers under the military regime, the inadequacy of military justice to handle the complexities of commercial transactions.[32] The rough and ready justice that was sufficient or at least tolerated by soldiers who had no choice in the matter was certainly inadequate to the needs and expectations of the merchants of Montreal.

The merchants were not without their faults, however; a public dispute between the merchants and Brigadier General Burton over the rulings of a Court Martial does not show them to advantage. The case concerned the forcible invasion of the bedroom of a respectable widow by one of a group of drunken merchants, "naked all to his shirt," which so startled her that she jumped out of the window, "naked as she came out of bed". The woman, having left behind two of her daughters in an adjacent room, sought help from a captain of the 27th Regiment, who "went with a file of men to quell the riot and seize the rioters." According to Burton's letter to the Board of Trade of 1 February 1764, the captain was personally ill-treated, some merchants were confined, then released upon bail. A general court martial was ordered, and "the whole body of merchants took fire at it." Some were found guilty and fined and although Burton mitigated the fine, the merchants expressed their disapproval, "by neglecting to pay the King's representative

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[32]Burt, Quebec, p. 109.

[Burton] the compliments of the season, in a body, on the New Year's Day, as it has been practiced here since the reduction of the country."[33] Since it cannot be supposed that the Brigadier missed the company of the merchants, the chagrin evident in his letter to the Board of Trade was certainly due to the success of the merchants in symbolically displaying their contempt for his authority.

The same letter from Burton to the Board of Trade provides further insight into Thomas Walker's specific role in the civil-military conflict. Burton's somewhat jaundiced description of Walker is worth quoting in full:

> One Tho. Walker, who by means of a tolerable Cargo brought into this Colony in 1763, hath given himself out for a Man of great substance and larger Credit and by great facility of speech had endeavoured to persuade the other merchants here of his being thoroughly conversant with the Laws & Priviledges of Britons & equal to convince any Man of the superiority of His Abilities, therefore a most proper & unexceptionable leader for them.[34]

Burton's dislike for Walker began almost as soon as they met. The day after Burton's arrival in Montreal, Walker presented him with a petition against a clerk, Leonard Hugo. Unaware that the case had already been tried before the military court, Burton ordered that the matter be laid before the court. This prompted a second petition from Walker, which, according to Burton, "runs in a most dictatorial style, contains many indecent & even insolent expressions against the Military Court," including the accusation that "a veil had been drawn on purpose over the truth." According to affidavits Burton enclosed in his letter, Walker had behaved in a disrespectful and contemptuous manner in the court and had refused to pay the sixteen pounds sterling awarded to the clerk by the court, saying, "Je me fricasse de cette sentence & je m'en fous." Burton heard the appeal and confirmed part of the sentence and reduced the fine. Walker still refused to comply

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[33]Brigadier General Ralph Burton to the Board of Trade, 1 February 1764, PRO CO 42/1. ff. 163-172; Burt, Quebec, p. 110.

[34]Brigadier General Ralph Burton to the Board of Trade, 1 February 1764, PRO CO 42/1. ff. 163-172.

even after Burton remonstrated with him about "the bad Consequence of flying in the face of Government & setting such an example of Disobedience in a new conquered Country." Only a warrant to seize him bodily could make him pay "the Paultry sum of seven pounds odd shillings Sterling."[35]

It was on this incident that Burton placed the blame for the hostility of the merchants towards the courts established in Montreal.[36] Once again the dispute is traceable to the refusal of the merchants, in this case Thomas Walker, to accept the jurisdiction of the military court. Burton's remonstrance shows both the concern of the military with order and his awareness of the threat to the legitimacy of the colonial authority posed by Walker's defiance.

The merchants continued to oppose the military authority, taking action that was regarded as seditious. Notices were stealthily put up at night, one of which Burton enclosed in his letter:

> Queries humbly proposed to the Consideration of the Publick
>
> Whether Canada was conquered at an immense expense, only to establish more Government & to put power into the hands of Military officers?
> Whether the extension and Security of Trade & Commerce, was not an object more worthy of national regard?
> Whether in flagrant Acts of Injustice, or notorious partiality, the Authors however distinguished may not be made answerable by the Civil Judicature?
> Whether the plea of Ignorance will be admitted?
> Whether persons in Authority, would not do well to consider themselves, as accountable Beings, both in this World & the Next?
> Whether or not they think a British Subject is vested with certain rights, & priviledges by Magna Charta?
> Whether he forfeits those Rights by entering a Garrison Town?
> Whether Government was instituted originally for the Happiness of Many or for the Emoluments of the few?

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[35]Ibid.

[36]Ibid.

(signed Publicola)[37]

This is a very interesting political tract, short though it is. The author first argues that the national goal in conquering Canada was trade and commerce, not the expanded power of the military. Then the anonymous author threatens even the highest military officers, first with civil retribution, then with divine. Finally he stakes his claim on the rights vested in British subjects by Magna Carta before sketching an appeal to a implicit contract theory of government.

These advertisements had a very bad effect, according to Burton,

> sowing principles of sedition, among His Majesty's subjects, giving to the New ones, a despicable idea of the present Government & to the old British subjects strange notions of Licentiousness, under the mark of Liberty, & a Desire of controuling whatever is ordered for the Good of the King's Service and the advantage of the Country.[38]

This paragraph could be read as a description of an erosion of the legitimacy of the military government in the eyes of the British-born colonists. It also could be read as a description of a particular understanding of the role of subjects of the King. It was licentiousness to think that they should desire to control the administration of the colony. Submission to government, not participation in government, was the prescribed role of subjects of the King.

The conflict between the merchants and the military had also been expressed in the address to Governor Murray congratulating him on his appointment as Governor of the Province of Quebec. The merchants made mention of "arbitrary imprisonments and Exactions which they had groaned under and which they hoped to be relieved by the establishment of civil Government."[39] The address was printed in the Quebec Gazette

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[37]Ibid.

[38]Ibid.

[39]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53, ff. 282v-283.

and prompted a reply from General Burton, Colonel Christie and Lieutenant Bruyere in the same paper.[40] According to Murray, "this made an open rupture between the Army and Magistrates for the resentments of those of superior rank are immediately adopted by inferiors."[41]

The military and the merchants, or at least the vocal magistrates among them, held very different fundamental assumptions about the nature of society and its governance. The military men, Governor Murray among them, can be seen as representative of the older form of society, one where all were linked in a hierarchy from the highest to the lowest – a society best described as a kingdom, where all authority was derived from the king and the duty of the subject was obedience. The merchants, on the other hand, proceeded from a conception of society shaped by their experience of commerce and contract, where government could be described as being originally instituted for the "Happiness of the Many," rather than the "Emoluments of the few." They referred to a concept of authority arising from the members rather than descending from the King. These two ideas of society existed in tension in the eighteenth century, not only in the colony of Quebec, but in Britain, and in the thirteen colonies to the south.

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[40]The address: "...by the British Merchants and Traders of Montreal...From these happy Effects of Your Excellency's Genius; from Your known Character of Humanity and Goodness; and from the speedy Establishment of civil Law and Justice amongst us, we are induced to believe that our Commerce will revive, and that an effectual Stop will be put to all arbitrary Imprisonments, and to the numberless Exactions, of persons in publick Office, in defiance of the Law." Quebec Gazette, 20 September 1764.

The reply: "...We therefore deny the Allegations of mercenary Views, or Exactions in any One Instance during our Service in America, and think such publick Accusations ungenerous to be printed, and a bad Reward to Officers, who always have discharged the Trust reposed in them with Honor and Integrity. With Respect to arbitrary Imprisonments, the Law, and its Forms, throughout all Canada, were lodged in the Hands of Judges appointed by the Conqueror, approved by His Majesty. Nothing Arbitrary ever was done in this Government, by Individuals stretching Power, but upon the Decision of Judges properly authorized, who might mistake the Law, but kept as near to Equity as Conscience and Honor pointed out, without Fee or Reward.." R.Burton G.Christie J.Bruyere. Quebec Gazette, 4 October 1764.

[41]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53, f. 283.

Chapter Six - Thomas Walker's Ear, continued

The story of Thomas Walker's ear did not end with the assault, nor did the disputes between the military and civil authorities. The civil administration, in the person of Thomas Lambe, Justice of the Peace, did its best to find Walker's assailants, offering a reward of two hundred pounds Sterling, a full pardon, and a discharge from the army to anyone who would come forward to testify. The reward was supplemented by another three hundred pounds Sterling offered by the merchants. No-one took the bait. There are hints that the soldiers of the 28th, heretofore very harshly disciplined, enjoyed a marked leniency at the hands of their officers, even to the extent of extra rations of rum, the implication being that the officers could not treat the men as usual for fear that a disgruntled soldier might take up the reward.[1] Four soldiers were eventually arrested and committed to the gaol: two Sergeants, James Rogers and John Mee, and two private soldiers, James Coleman and John Maclaughlin. According to Thomas Lambe, they had "two or three plates sent [to them] each meal from the house where the officers of the Regiment mess, and what wine or Whatever [they] desired from their own table."[2]

Murray later complained that the efforts of the Magistrates might have been more effectual if General Burton had not "insisted on all the forms which the Law requires when Troops are to assist the Civil Magistrate,"[3] and that many opportunities had been lost as a result. By this he meant the insistence of the military officers that no soldier be examined except in the presence of his officers, a measure provided in law for the protection of the military from arbitrary actions on the part of the civil authority but having the effect in this instance of ensuring that no soldier dared inform on his comrades – or his superiors. Murray went on to explain that the officers' lukewarmness

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[1]Thomas Lambe, Narrative Relating to the Behaviour of the Officers &c, 1765, PRO CO 42/4, ff. 179-182.

[2] Ibid.

[3]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53, f. 286.

was somewhat understandable as Walker indiscriminately accused almost every officer in the place. Justice Lambe complained that the husband of one of his servants, a soldier, had been confined, by the officers of the 28th, four times since the attack on Walker, on suspicion that he had given Lambe information regarding the assault. Lambe was convinced that a number of officers had been principals in the attack, although he was unable to offer more than circumstantial proof of it.[4]

For their part, the officers of the 28th Regiment, Captain James Mitchelson in particular, protested the treatment of soldiers and non-commissioned officers by the civil authorities:

> it appears several non-commissioned officers, and soldiers (even upon duty) are Laid Hold of, without regularly demanding them, and Thrown into Goal[sic] on a Vague suspicion & committed even to Dungeons without fire at this time of year, and put in Irons upon a Verbal order and afterwards by the Warrant of a Single Justice antedated as can be proved, tho' the Informations against them are not upon oath, as will appear by the Respective Warrants Copies whereof I have the Honour to inclose.

Mitchelson regarded these proceedings as illegal and asked Burton to represent to the Governor that he could not answer for the Regiment, "when they See their fellow Soldiers dragged to Jail on the Slightest Pretences contrary to the Act of Parliament which requires them to be Demanded," that it was only with difficulty that they were restrained from rising in mutiny.[5] Murray did submit the warrants to the Attorney General George Suckling for an opinion as to their legality. Suckling affirmed that they

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[4]"Whoever deliberately considers the Nature of the attempt, and how little provocation private Soldiers cou'd have to Instigate them to so horrid a Scene of Villainy will very naturally conclude that some officers of the Regiment were concerned in that Bloody Act itself and from the Deposition of Mr Tottenham [Lieutenant and Adjutant of the Regiment] there is great cause of Suspicion that many more were privy to the Intention, five of the assassins were pursued by the high Bailiff and his Posse over the Town Wall by the Sally Port at the Intendance, the Sally Port of Donnelly's was kept open, there can be no doubt but that two officers lay at Madame Bergeras at Long Point that night this is very Circumstantially proved by the Depositions of five people, Particularly by George Howard who saw them go away the nest morning and described them very particularly." Thomas Lambe, Narrative, PRO CO 42/4, ff. 179-182.

[5]Captain James Mitchelson to Brigadier General Ralph Burton, 13 December 1764, PRO CO 42/4, ff. 183-184.

were indeed legal and praised the Justices of the Peace for their "steady conduct and resolute perseverance."[6]

The situation in Montreal was not improved when the magistrates felt it necessary to put one of the prisoners in the dungeon because they had received an anonymous letter informing them of plans for an escape. When Thomas Lambe asked General Burton for a guard for the prison, Burton refused unless a magistrate would remain with the guard at all times.[7] Later that night while the magistrate and some gentlemen of the town sat up on guard, the Brigadier sent a message requesting that the Sergeant be released from the dungeon and returned to the common room. Lambe refused his request.

Burton, whose sympathies were quite naturally with the military, wrote to Murray saying that he could not answer for the troops' behaviour, that mutiny was a possibility. The threat was but thinly veiled. Murray and the Council went down to Montreal and found "the greatest enmity raging between the Troops and Inhabitants."[8] The Council wanted to move the troops out to cantonments in the country, thereby easing the burden of billeting on the inhabitants; Burton professed himself unwilling to reduce the Garrison that far and suggested an exchange instead, so the 28th Regiment was sent to Quebec and the 2nd Battalion of the 60th Regiment replaced them at Montreal.[9]

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[6]Attorney General George Suckling, Opinion, 16 December 1764, PRO CO 42/4, f. 189.

[7]This followed an exchange of notes between Martha Walker and General Burton in which she asked for a guard for the Walker house and another for the gaol where one suspect had been placed in custody. Burton first informed her that he could only set such a guard if applied to by a magistrate. When she procured such an application he agreed to set the guard only if the magistrate would undertake to be present at all times, to provide continuous direction to the guard. PRO CO 42/4, ff. 171-174, 179-182.

[8]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53, f. 287.

[9]Minute of Council, 3 January 1765, PRO CO 42/4, f. 176; Brigadier General Ralph Burton to James Goldfrap, 4 January 1765, PRO CO 42/4, ff. 174-175; Goldfrap to Burton, 4 January 1765, PRO CO 42/4, f. 176; Burton to Goldfrap, 5 January 1765, PRO CO 42/4, f. 175.

Murray and the Council remained in Montreal for some time, the magistrates taking the witnesses' depositions in their presence. Some new magistrates were appointed and some Justices of the Peace from Quebec were added to the Commission of the Peace in Montreal. Satisfied that they had done all that could be done to restore order to the town, Murray and the Council set out for Quebec. While on the road, Murray received a petition from the 28th Regiment, praying that the soldiers committed to the gaol might be turned over to the Regiment which would undertake to ensure their appearance at their trial.[10] Murray refused.

Two days before the departure of the 28th Regiment for Quebec, a rescue of the prisoners then in gaol was attempted. In his deposition, Captain David Skene (also of the 28th Regiment) explained what ensued:

> Captain Skene deposeth and saith: That on or about the sixteenth of last month immediately after Roll calling at Montreal, in the Evening, he heard a Huzzaing & noise about the Goal and People calling out that the Prisoners were taken out of the Goal. Upon which the Deponent ran as fast as he Could towards the Goal where there were upwards of two Hundred Soldiers as he imagines; That by the time he had got half way to the Goal, the Soldiers were huzzaing the prisoners along the street that leads from the Prison to the Quebec Gate; That the Deponent followed them on foot till he was quite out of Breath; and that meeting at the end of the Quebec Suburbs, a french Gentleman in a Carriolle he stopped him and told him that he the Deponent must have his Carriolle to pursue the prisoners, to which with some difficulty the said French Gentleman complied. That the Deponent overtook the Soldiers & Prisoners about two miles & a half from Montreal; that he made the aforementioned Gentleman drive past them to the distance he imagines of about one Hundred yards then the Deponent got out of the Carriolle and run towards them with his Sword drawn calling out as loud as he was able that he would run the first man through the Body that offered to pass him, That this Threat seemed to have some Effect, but they still moved on though slower then before, upon which the Deponent made a pass at one of the men who was in the front whereby the said man being wounded he fell back which intimidated the rest, The Piquet then came up and the

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[10]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53, ff. 289-290.

> Deponent Delivered the three Prisoners to Mr Black who commanded the said Piquet and Desired him to Carry them back to the Goal.[11]

Skene named the man he had wounded as one Gustavus Hamilton, a Soldier of the Twenty Eighth Regiment.[12] Skene's efforts apparently earned him the lasting enmity of his Regiment; in 1766, Murray wrote to Brigadier General Frederick Haldimand, asking him to take Skene into his employ, "that he may not be obliged to associate with men who hate him because he loves Truth and can do nothing inconsistent with the character of a Gentleman...It is not the pay we want, it is to be under your Protection and free'd from the Tyranny and Caprice of the most extraordinary man I ever knew at the Head of a Corps." Skene was willing that someone else receive the pay as long as he could serve under Haldimand.[13]

Skene's heroism went for naught, however, as no precautions were taken to secure the prisoners and they were broken out again the same night. In the company of James Roseborough, Daniel Ashman and Thomas Donnelly, all of the 28th Regiment, they gave themselves up the next day to the Commanding Officer at the fort at Chambly. Roseborough, Ashman and Donnelly returned to their Regiment in Montreal. William Weir, the Provost Marshall of Montreal came to Chambly the next day with an order from Burton to deliver up the prisoners, but refused to take charge of them. He gave the ensign in command of the fort authority to take the prisoners to Point aux Trembles where they were turned over to Captain Skene again and from there conveyed to Quebec.[14] They had successfully defied the civil authority in Montreal.

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[11]Deposition of Captain David Skene, 3 February 1765, PRO CO 42/4, ff. 196-197.

[12]Ibid.

[13]Governor James Murray to Colonel Frederick Haldimand, 21 April 1766, British Library, Add. MSS. 21666, f. 206.

[14]Information of Ensign Arthur Cole, 8 February 1765, PRO CO 42/4, ff. 204.

As Murray somewhat sarcastically reported to the Board of Trade in London: "Brigadier Burton under whose command the revolt happened had no doubt very good reasons for not enquiring into it and for not endeavouring to discover the author of it." Since Burton had not chosen to investigate, Murray urged the commanding officer in Quebec to find the ringleaders of the rescue and punish them by court martial, since it "would be more for the honor of the corps and more Effectually prevent malicious Conjecture than if the Civil Magistrates took Cognizance of it and discovered the guilty."[15] The officer refused. The civil officers did undertake the matter and Roseborough, Ashman and Donnelly were arrested and were to be tried at the same time as Rogers, Mee, Coleman and McLaughlin.

The 28th Regiment went to considerable trouble and risked a great deal to remove the accused men from the control of the civil authority in Montreal and place them under the control of the military and remove them to Quebec. Why? Were they afraid that harm would come to their comrades? Was it a matter of pride? Was it an act of defiance? Or was it that they wanted to keep the prisoners under their eye? The author of an anonymous letter, signed Mathew Gospell, claimed that several men had been sent off by their officers to prevent them taking up the reward offered for information in the case. The reward offered was substantial and the author of the anonymous letter claimed that one of the prisoners was "amind to turn Kings Witness after ye Rest is gan."[16] Taken all together, the evidence does seem to indicate that some of the officers of the 28th Regiment were involved in the attack on Walker and that others were complicit in protecting the guilty.

The attack on Walker seems to have been planned quite deliberately; it was not the impulse of the moment by a few drunken soldiers. Did the officers of the 28th Regiment

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[15]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53 f. 291.

[16]Anonymous Letter signed Mathew Gospell, 13 December 1764, PRO CO 42/4, ff. 186-188.

see Thomas Walker as a symbol of the civil authority? That is to say, was this an overtly political act of defiance? Did they mean to overthrow civil authority by this action? Probably not. Walker was an irritant; they only meant to teach him a lesson, to mark him in a permanent and public way. But they were not restrained from attacking Walker by respect for his office or by submission to the civil authority he embodied. Even if the officers of the 28th did not thereby intend to publicly declare their defiance of the civil authority, that is exactly what such an action menaced. Furthermore, when the regiment "rescued" those accused of the assault, they again defied the civil power and refused to submit to its authority.

Nor did their superior officers show much respect or submission to the civil authority. "The troops are not to be insulted and provoked," Brigadier General Burton wrote to Governor Murray. Captain Mitchelson warned that he could not answer for the regiment if they saw "their fellow Soldiers dragged to Jail on the Slightest Pretences." Both these warnings contained an element of threat, a threat made more real by the recent assault on the Justice of the Peace. When Burton stated that he could not answer for the behaviour of the troops, Murray and the Council deemed it advisable to remove the 28th Regiment from the town of Montreal; they regarded the threat as real. The image created is of a dangerous and barely contained force which could all too easily break its bounds.

Martha Walker, writing to General Burton shortly after the assault, expressed the sense of vulnerability felt in the face of such a force:

> Can you Sir who are at the head of his Majesty's Troops who are certainly kept here for the Defence of his good Subjects further the designs and forward the views of assassins we must henceforth Implore our most Gracious Sovereign to recall his Civilised Troops and leave us to the care or resentment of savages, far less cruel than they, for they never Butchered in Cool Blood an honest Innocent man in the bosom of his Family.[17]

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[17]Martha Walker to Brigadier General Ralph Burton, 8 December 1764, PRO CO 42/4, ff. 172-173.

That the military continued to protect the perpetrators of the assault may be perfectly understandable but such an action nonetheless represented a studied defiance of the civil authority and illustrates the dangers of a society where legitimate authority has not been established.

The Governor, the Council, and the Attorney General all recognized the significance of the assault and were eager for the culprits to be brought to justice. They were to be disappointed. At the trial held in Quebec beginning 28 March 1765, the jurors of the Grand Jury refused to bring in a bill of indictment against the first of the soldiers, Sergeant James Rogers.[18] The jurors decided that they did not have the authority to act in the case because they were all residents of Quebec rather than Montreal.[19] Consequently, all the bills were thrown out and the several defendants and witnesses discharged.[20] However, the bills against the defendants could not have succeeded even if the jurors had acted, since the principal witnesses, Thomas Walker, Martha Walker and Walker's servant, John Lilly, did not appear.[21] The soldiers discharged by the court were immediately recommitted on warrants issued by the Justices of the Peace according to the instructions of the Attorney General. The Regiment was this time permitted to bail them.[22]

This summary of the bare facts of the trial leaves a number of questions unanswered, however. Why did Walker not appear? He had complained loudly and long of his injuries and demanded redress but failed to appear to press the charges. Why did the

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[18]Quebec Minute Book, 27 April 1765, NAC RG1 E1 Reel C85.

[19]Ibid., 29 April 1765.

[20]Court Reports, 20 April 1765, PRO CO 42/53, ff. 251-252.

[21]Minutes of the Court of King's Bench, 12 April 1765, PRO CO 42/3, f. 247; PRO CO 42/53, f. 252.

[22]Captain Benjamin Payne to Colonel Walsh, 28 June 1765, PRO CO 42/4, ff. 236-237.

jurors refuse to act? Behind the bare facts lay a complex political situation that resulted in the failure of the prosecution of Walker's assailants.

At first the trial was to be held in Montreal. An ordinance had been passed in September of 1764 establishing regular courts in Montreal. But on the 3rd of January 1765 the Council passed a resolution stating that it was not necessary to do so as the business could be transacted in the Courts at Quebec. Murray later gave as the reason for this the fact that there were only fifty-two Protestant householders in Montreal, most of whom would have been challenged by one side or the other, so it would have been impossible to hold the trial there.[23] The Minute Book of the Council gives as justification for the change the fact that it would have cost the government a great deal to hold the court in Montreal. The Attorney General in a memorial to Governor Murray in May 1765 maintained that it had been his idea to save the government expense.[24] An ordinance requiring that jurors be drawn from the province at large rather than only from the district of Quebec was also passed by the Council.[25]

Both these measures met with vehement protest from Walker. In the formal protest that he had Williams Conyngham draw up and notarize, Walker first argued that in a province as extensive and populous as Quebec it was necessary to have a court at Montreal, and that the Governor and Council had passed an ordinance to establish such a court; therefore the resolution which contradicted that ordinance could not be valid.

Next he argued that the resolution was contrary to the Laws and Statutes of England, where an offence or action was to be tried in the district or county where it arose and

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[23]Governor James Murray to the Board of Trade, 24 June 1765, PRO CO 42/53, f. 278.

[24]Memorial of Attorney General George Suckling to Governor James Murray, 3 May 1765, PRO CO 42/53, f. 273.

[25]Quebec Minute Book, 6 March 1765, 9 March 1765, NAC RG1 E1 Reel C85.

before a jury drawn from that district or county. The reasoning behind the latter is interesting: the jury was to be composed of persons who were supposed to know one or both of the parties and would be "therefor more proper to try the Facts".[26] Walker then protested that the trial of his case in Quebec would cost him a great deal, as all his witnesses were resident in Montreal. In fact, he said, it would be tantamount to a suppression of the prosecution because his witnesses refused to attend a trial in Quebec even if served with subpoenas, especially as they all believed that the Chief Justice would remit all fines imposed for contempt or disobedience to the subpoena.

Walker then expanded his argument – the resolution would be oppressive to all of His Majesty's subjects not resident in the District of Quebec. Returning to his personal circumstances, he quite persuasively catalogued the hardship he would suffer: Because he would have to bring his wife and his servants to testify, he would have to shut up his house and store. Not only would he lose business but he was worried about the security of his goods and merchandise (which he claimed were worth £10,000). This was also a critical time of year for anyone engaged in the Indian trade, as it was the time for preparing and equipping the canoes to go upcountry. He also claimed that his wounds were so recently healed that he was afraid to undertake such an arduous journey for fear of opening them again and thus endangering his life.

Once again, he expanded his argument to the general good – he and his fellow residents of Montreal and Trois Rivières had an equal right to the residents of the district of Quebec to have their cases tried in their own districts – before returning to the personal. He feared for his life and the safety of his witnesses if they went to Quebec because the

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[26]In contrast, in 1783, George Davison, a Legislative Councillor, opposed the introduction of jury trials, arguing, "in all small communities, as well as in this, there must necessarily be a degree of connection or dependance thro' Interest, alliance or friendship which argues strongly against the Impartiality of the Trial by Jury." "George Davison," Dictionary of Canadian Biography, p. 197.

28th Regiment, "enraged against him," was then on duty in Quebec.[27] Many of Walker's arguments seem quite persuasive, but they were not well-received.

The Council asked the Attorney General to give an official opinion as to whether the protest was "not highly libellous and seditious striking at the very Root of Government."[28] The Attorney General agreed that it was libellous and seditious and recommended prosecuting both Walker and Conyngham, but the Council contented themselves with suspending Walker from acting as a Magistrate and dismissing Conyngham "from acting as an attorney or advocate in any of the Courts of Justice throughout [the] Province.".[29] Conyngham's dismissal was strongly protested, not by Walker, but by the officers of the 28th Regiment, because he was acting on behalf of the soldiers of the 28th charged in Walker's assault.[30] Walker couched his protest against the removal of his trial to Quebec from Montreal in the language of political rights – the rights of the people of Montreal to equal access to justice. These rights were not acknowledged – in fact, to claim them was deemed sedition. The more personal reasons Walker gave for refusing to appear in Quebec seem to be the more genuine. A personal letter written by Walker in 1766 suggests that the most pertinent of his reasons was his fear of the 28th Regiment, a very reasonable fear, given his recent experience with those soldiers.[31]

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[27]Thomas Walker, Protest, 14 March 1765, PRO CO 42/53, ff. 206-212.

[28]Quebec Minute Book, 3 May 1765, NAC RG1 E1 Reel C85.

[29]Ibid., 21 May 1765.

[30]"...that the said Regiment have their utmost Dependance upon the said Connyngham as their attorney, as he is thoroughly acquainted with their Case and therefore are extremely distressed at being deprived of the Benefit of his assistance by such suspension and the rather as there is no other person so capable of Discharging himself to the Satisfaction of the Regiment and your memorialists are very certain the said Private men so accused Cannot with Safety to themselves abide their Tryal without his assistance." Memorial to Governor James Murray, 29 May 1765, PRO CO 42/4, f. 234.

[31]"The 28 Regt left Quebec about 10 days before my arrival so I went ashore...I deliver'd the Secretary of State's Letter to Col Massey, who gave out the enclos'd orders to the Troops under his Command, in short he came to my House the same day, examin'd some suspected soldiers before me, offer'd not only to protect & defend my person from Insult but the whole force of the Garrison to support my authority as Magistrate...he spoke of the misfortune that befell

In addition to Walker's failure to appear, the trial at Quebec was stalled by the refusal of the Grand Jury to bring in bills of indictment against the accused, the jurors protesting that it would be illegal for them to act as a jury for the whole province when they were only drawn from the district of the town of Quebec. Some irregularities had attended the calling of the jury, as the Attorney General George Suckling was at pains to point out. The jury panel from which the jury was selected was to be summoned by the Provost Marshall. This was an appointment held, like many others, by patronage. Nicholas Turner was the patentee. He resided in London, and had no intention of himself fulfilling the duties of the position. Nor was it expected that he would. He had appointed a Deputy, James Goldfrap, to perform the duties of the office. Goldfrap was a busy man. He held deputations from Henry Ellis as well, as "secretary of the province, clerk of the Council, commissary or steward-general of provisions and stores, and clerk of the Inrollments."[32] Therefore, he appointed a deputy. It was this deputy, Joseph Walker (no relation to Thomas), who had summoned the potential jurors. Being very new to his job, he incorrectly signed the precept with his own name rather than with the name of the patentee or his deputy. Of more concern, according to the Attorney General, Joseph Walker used a list containing names from the district of the city of Quebec only. The Deputy Provost Marshall of Montreal, Edward Chinn, another deputy of Goldfrap, had also provided a list from his district but this list was not used in summoning the jury, though whether by accident or by design is unclear. The Attorney General asserted that the Chief Justice, William Gregory, knew that the first list contained only Quebec residents but permitted it to be used anyway.[33]

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me with much concern, & said he hop'd that no part of the Regt he had the Honour to Command had any share in it, in short he behav'd in a very genteel, Manly, manner & gave me such assurances, that I have dismiss'd all my fear (but not my cautions) for personal safety." Extract of a Letter, Thomas Walker to John Strettell, 20 June 1766, PRO CO 42/86, ff. 172-173.

[32]The Maseres Letters, p. 43.

[33]The Clerk of the Crown was sworn before the Council and asked by the Attorney General whether he told the Chief Justice that there were two panels to the Provost Marshall's Precept. He answered in the affirmative and went on

The Attorney General protested these irregularities during the trial.[34] But Chief Justice Gregory ruled that the jury was a legal jury and that the trial might continue. The jurors, however, declaring that they considered themselves a Grand Jury returned for the District of Quebec alone and not for the province at large, claimed they could not act in good conscience on the "Riot and Rescue" at Montreal, despite written assurance from the Governor and Council that they should proceed.[35] One of the jurors later testified that Walker's protest had been read in the jury room and that if even a third of the jury had been from Montreal, the jury would have proceeded with the indictments.[36] Without bills of indictment there could be no trial so the defendants and witnesses were discharged.[37]

Attorney General Suckling was summoned to appear before the Council and explain why he had failed in the prosecution of Walker's attackers and those involved in the prison break at Montreal. He read a written defence to the Council on 24 April 1765. On 23 May 1765, the Attorney General printed his defence to the Council in a Supplement to the Quebec Gazette. In this document he complained of the actions of the Chief Justice in refusing to listen to his concerns about the legality of the jury panel.[38] This led to a public exchange of recriminations between the Attorney General and the Chief Justice. In response to the Attorney General's Supplement, the Chief Justice complained in Council that he had been publicly maligned. The Attorney General was

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to say that the Chief Justice told him to read the first in turn. Quebec Minute Book, 27 April 1765, NAC RG1 E1 Reel C85.

[34]Court Reports, 4 April 1765, PRO CO 42/53, f. 246.

[35]Answer of the Governor and Council to a Memorial from the Grand Jury of the Assizes, Quebec Minute Book, 11 April 1765, NAC RG1 E1 Reel C85.

[36]Quebec Minute Book, 27 April 1765, NAC RG1 E1 Reel C85.

[37]Court Reports, 20 April 1765, PRO CO 42/53, ff. 251-252.

[38]Supplement to the Quebec Gazette, 23 May 1765.

summoned and asked to prove his assertions, which included the significant accusation that the Chief Justice had let it be known that no witnesses or jurors from Montreal who failed to appear at the court in Quebec would be fined.[39]

It should also be mentioned that at this same sitting of the Assizes, presided over by Chief Justice William Gregory, Attorney General Suckling had himself been a defendant. He had been charged with assault in correcting his servant, a prosecution initiated by Williams Conyngham. He was found guilty but moved an arrest of judgement against the verdict, claiming that the law gave a master a right to correct his servant. The Court admitted his claim but asserted that the correction must be in moderation. The Clerk recorded the judgement of the Court: "In the present Case the Correction appears to exceed those Bounds therefore the Verdict [is] Good and the Motion overruled." Suckling was fined five shillings on each of two indictments.[40] Was this ruling by the Chief Justice the reason for Suckling's scrupulous attention to the formalities of the law in calling the jury?

Even prior to this public dispute, Governor Murray had regarded both men as less than ideal for the positions they held:

> Our Chief Justice and Attorney General are both entirely ignorant of the Language of the Natives [the Canadiens], are needy in their Circumstances, and though perhaps good Lawyers and Men of integrity, are ignorant of the World, consequently readier to puzzle and Create Difficultys then to remove them.[41]

But there was more to the story than appears from a reading of the court records. A Memorial addressed to Governor Murray by Attorney General Suckling provides more

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[39]Minutes of Council, 20 June 1765, PRO CO 42/3, ff. 151-152.

[40]Court Reports, 19 April 1765, PRO CO 42/53, f. 249.

[41]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53, f. 282.

insight.[42] The evidence is biased, of course, by Suckling's desire to vindicate himself in the eyes of the Governor but something may be gained from it nonetheless. According to Suckling, Williams Conyngham, an attorney who had arrived the previous summer "under the Patronage & Protection of His Majesty's Chief Justice [Gregory]," and been appointed Coroner and Clerk of the Peace on Gregory's recommendation, was largely responsible for the failure of the witnesses and jurors from Montreal to appear at the trial at Quebec. Conyngham had been troublesome from the beginning, Suckling claimed. In the fall of 1764, he had provided Joseph Walker, the Deputy Provost Marshal, with the list of men to be returned as Grand and Petty jurors. "At the top of the first [list], were the Malcontents from not having been made Magistrates, and a few others, whose want of understanding, and whose situation in Life rendered them fit Tools of the Resentments of the former," asserted Suckling.[43] These were the Grand Jurors responsible for the Presentments of 1764 that caused so great a stir in the colony and in London.

This same Grand Jury, he went on to say, presented one of the new Canadian subjects, Claude Panet, as a disturber of the peace, "because he was instrumental in assembling together the Chiefs of the new Subjects in Quebec in order to draw up a Petition to the King's most excellent Majesty." According to Suckling, the reason for the Grand Jury's presentment of Panet was merely "to deter the new subjects from even making Representation to their new and most gracious Sovereign, of Grievances which they already felt and of those which they Justly apprehended."[44] Conyngham, as Clerk of the Peace, drew up the Bill of Indictment against Panet and sent it to the jury to determine. The Justices decided to quash the indictment if the jury should find it a true bill, because

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[42]Memorial of Attorney General George Suckling to Governor James Murray, 3 May 1765, PRO CO 42/53, ff. 270-275.

[43]Ibid.

[44]Ibid.

of the bad consequences they considered would result from the prosecution of one of the new subjects, "for no offence whatsoever." They declared this in court when the bill was returned but the Clerk, Conyngham again, failed to endorse the bill to this effect or make a minute of their decision in the court records. The following December, Suckling reported, Conyngham asked that the Attorney General seek a Writ of Certiorari from the Chief Justice, to remove the indictment against Panet to the Superior Court. Surprised because he thought the indictment quashed, Suckling asked Conyngham to meet with him so that he could advise him on the matter. This Conyngham declined to do, and in January Suckling learned that the Custos Rotulorum, Samuel Gridley, had been served with a Writ of Certiorari dated 19 January 1765 and returnable on the 21st of the same month, removing Panet's case to the higher court. Since the Chief Justice's commission for the Superior Court was not published until the 21st of January, Suckling regarded the Writ as invalid. He acquainted the Chief Justice with his opinion privately – to no avail. He then complained to the Court of "the great abuse of the King's Writ, and the insult done [him] in [his] office," – again to no avail.

> Mr Conyngham being now admitted an Attorney of the Court, reigned with unbridled Liberty and Insolence without dread of Punishment, or even fear of a Reproof, and usurped the Rights of my Office without the least control from the Court.[45]

At Conyngham's instigation and over the protest of Suckling, the Custos was severely fined for the late return of the Writ. Suckling argued that some indulgence should have been shown him, given the newness of both the establishment and the Custos. According to the Attorney General's narrative, Williams Conyngham prosecuted a Canadian subject unjustly and in defiance of the ruling of the Justices that the indictment was invalid, refused to listen to advice that it was inappropriate to remove the case to the Superior Court, persuaded the Chief Justice to issue a writ before the Court was legally constituted by its Commission, and secured an unnecessarily punitive fine against the Custos Rotulorum. The Attorney General himself does appear, both in this account and

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[45]Ibid., f. 270.

from his actions during the trial, to have been a stickler for procedural detail, "readier to puzzle and Create Difficultys then to remove them," as Murray claimed.[46]

The Attorney General then cited another example of what he regarded as inappropriate behaviour on the part of Conyngham:

> The same Term Mr Conyngham, under the countenance of the Chief Justice commenced a Prosecution in the Supreme Court (unknown to me) against Three poor Frenchmen of the Isle of Orleans, for a common assault, on Mr. John Ord's servant, and without any one to appear and plead for them, they were the same Term tried convicted and committed to prison, and being in confinement they were terrified into a composition with the prosecutor for so large a sum as Two hundred and forty Dollars, besides a fine and exorbitant Fees to Mr Conyngham, to the great impoverishment of themselves & Famillys; such unwarrantable Proceedings against His Majesty's New Subjects, must rivet them in their former Prejudices & make them detest both our Government & Laws.[47]

If this account is true, Conyngham used his office illegitimately to extort money from vulnerable people and the Chief Justice sanctioned his actions. This is the unpleasant face of patronage, where the friends of the powerful can use their position and connections to enrich themselves at the expense of the less powerful.

According to Suckling, Conyngham's sins were also political – he fomented divisions and had been one of those who signed the address of thanks to the Grand Jury for the Presentments of 1764. Even after he was removed from his office as Clerk of the Peace by Governor Murray, the Chief Justice continued to give him his patronage, though he "was again and again sollicited to abandon a Man, whose Rapacity, Chicanery, & Impudence was a Disgrace to his Profession, and whose Intimacy with the Judge made People believe he was encouraged in those unwarrantable Proceedings."[48]

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[46]Governor James Murray to the Board of Trade, 2 March 1765, PRO CO 42/53, f. 282.

[47]Ibid., f. 272.

[48]Ibid.

Of course, the Attorney General in his memorial to the Governor attempted to paint a flattering picture of himself and an equally unflattering one of his opponents. However, Governor Murray's letter to the Board of Trade in July of 1765 lends credence to the Attorney General's account. Murray wrote:

> The Minutes of Council, the Attorney Generals Memorial, and Mr Walkers Protest against the Government will sufficiently point out to Your Lordships the necessity of stopping Mr Cunninghames Career, to publish all the iniquitous Conduct of that Practitioner of the Law, would too sensibly affect the Chief Justice, a point I am very tender of for obvious Reasons, of this Mr Cunninghame was no doubt sensible & therefore had the confidence to demand a publick hearing.[49]

The Privy Council evidently concurred in the opinion of the Attorney General and the Governor – Chief Justice Gregory was removed and William Hey appointed in his place.[50]

It is clear from Suckling's memorial that he regarded Williams Conyngham as dangerous and that he heartily disapproved of the Chief Justice's patronage of the lawyer. Suckling was also anxious to refute the claim that his motive for disputing the calling of the jury at Walker's trial had been mere pique at his prosecution for assault against his servant, a prosecution commenced against him by Williams Conyngham – "as if the Pitiful consideration of a servant's prosecuting me for an assault was the cause of a Motion which I could not have neglected to make without a breach of the Trust reposed in me as His Majesty's Attorney General."[51] Suckling goes on to state that the points of law that concerned him were the right of a deputy to appoint deputies and the proper summoning and returning of juries. This latter point was the more urgent, he felt, because "it is

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[49]Governor James Murray to the Board of Trade, 16 July 1765, PRO CO 42/3, ff. 2-5.

[50]King in Council, Order, approving a report of the Committee of Council, . . . & directing that the Rt Hon Mr Conway do receive His Majesty's pleasure thereupon, 18 October 1765, PRO CO 42/5, ff. 1-4.

[51]Memorial of Attorney George Suckling to Governor James Murray, 3 May 1765, PRO CO 42/53, f. 273.

evident that one Great cause of the Divisions amongst us, has arrisen from the illegal and undue Manner of returning Jurries." The reference here is, of course, to the infamous Grand Jury of 1764, irregularly returned from a list provided by Williams Conyngham. He was not, then, being disputatious for a trivial personal reason. He went on to explain that he was more willing to test the points of law because he was aware that Walker had not appeared to press his case against his assailants and he hoped that the time taken up by settling the points of law would allow Walker to be persuaded or compelled to appear.[52] The Attorney General asserted that he had the prosecution of Walker's assailants, "much at heart, as [he] had a particular order from His Majesty's Council to use [his] utmost endeavours to procure satisfaction to the Publick for such a daring Outrage against civil Government."[53]

This was the background to Suckling's claim that it was Conyngham, acting for the soldiers charged with the assault on Walker and the prison break, who persuaded the jurors and witnesses in Montreal that they would not be fined for failing to appear at the trial in Quebec. And that the patronage given Conyngham by the Chief Justice added force to his persuasion. It was also Conyngham who drew up and notarized Thomas Walker's protest at the removal of his trial to Quebec from Montreal. There can be no doubt that the protest was genuine; Walker was angry at the change of venue for the trial, and felt that Murray had broken his promise to him by permitting the change.[54] But Walker's protest proved very useful to Conyngham, persuading the jurors not to bring in the bills of indictment against his clients, the soldiers of the 28th Regiment.

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[52]Ibid., f. 274.

[53]Memorial from Attorney General George Suckling to Governor James Murray, 3 May 1765, PRO CO 42/53, f. 275.

[54]Testimony of Thomas Ainslie before the Council, Quebec Minute Book, 27 April 1765, NAC RG1 E1 Reel C85.

The conflict between Chief Justice Gregory and Attorney General Suckling could be construed as a conflict between the old world of patronage and the new world of the professional. Gregory owed his position to patronage and in turn, his patronage of Williams Conyngham gave the lawyer power he otherwise would not have had. Both seem to have regarded their positions in the colony as opportunities for them to make their fortunes. By contrast, Suckling seems an officious character, perhaps a little pedantic, fussing about the dates of writs and whether a precept was properly endorsed. But it was a kind of professional pride that drove him, a sense of honour based not on status but on proper execution of his duties. He challenged the legality of the jury, not to prevent the trial from going forward but in the hope that a new properly constituted jury would be called so that the prosecution of Walker's assailants could succeed. Suckling used his professional officiousness to counter Conyngham's tampering with the witnesses from Montreal, given added force by the actions of the Chief Justice. During the Council enquiry into the matter, more than one juror stated that they would have been able to proceed if some members of the jury had been from Montreal.[55] Suckling was unsuccessful but his point was taken.

The Council ordered a second trial of the accused in both the assault on Thomas Walker and the prison break to be held at Quebec 21 June 1765. In response to some of the concerns expressed by Walker in his protest, the Council agreed that government would bear the expense of bringing Walker's witnesses to Quebec. Walker rather pugnaciously wrote to James Goldfrap, the Secretary of the Council, demanding to know what security for payment was offered.[56] Goldfrap frostily replied that the since the commitment was "in Consequence of an Order of the Governor and Council, entered in the Council book," no better security was needed or could be offered. Goldfrap also mentioned that a sufficient number of jurors "will be properly summoned from

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[55]Quebec Minute Book, 27 April 1765, 29 April 1765, NAC RG1 E1 Reel C85.

[56]Thomas Walker to James Goldfrap, 23 May 1765, PRO CO 42/3, ff. 58-59.

Montreal and it will be at their peril if they disobey the same."[57] Clearly every effort was being made to repair the deficits of the previous trial and meet Walker's objections even though his protest was deemed seditious.

In preparation for the trial, Murray asked Captain Mitchelson whether the 28th Regiment would consent to be moved to cantonments outside the city of Quebec as Walker declared that he was afraid to appear. The Regiment pronounced themselves willing to go whenever they were commanded to do so by Brigadier General Burton. Once again, though here it is carefully veiled under a cloak of formality, the military refused to submit to the civil authority. According to Captain Payne's report to Colonel Walsh, they feared that if they had agreed to move without such direction, it would have injured them in General Burton's opinion. Rather than apply to Burton for their removal, Murray moved the trial to Trois Rivières. It began on 1 July 1765.[58]

At this second trial a bill of indictment was brought in against Sergeant Rogers, but once again Walker and his wife failed to appear, having hidden themselves to avoid receiving the subpoenas. After a trial lasting ten hours, Rogers was acquitted and discharged. The soldiers accused in the prison break were all acquitted except Gustavus Hamilton, the unlucky soul wounded by Captain Skene. He was given a sentence of a year's imprisonment and a fine of twenty marks.[59]

Just before Walker's case went to trial the second time, Murray wrote to the Lords Commissioners for Trade and Plantations concerning Walker's motivations:

> Till lately I could not conceive the meaning of the indefatigable pains Mr Walker took to baffle every attempt the Government made to punish the

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[57]James Goldfrap to Thomas Walker, 27 May 1765, PRO CO 42/3, f. 60.

[58]Minutes of Council, 22 June 1765, PRO CO 42/3, ff. 159-160.

[59]Attorney General's Report to Governor Murray, 12 July 1765, PRO CO 42/53, ff. 301-302.

> perpetrators of these outrages, I little suspected he wanted to persuade the Merchants of London of the impossibility of procuring Justice here, and that they would as readily believe that, as they did the Establishment of a Whale Fishery on Lake Ontario.[60]

Was this Walker's motivation? Was he a tool of faction, as Murray thought, or of that "accomplished scoundrel," Williams Conyngham, as A.L. Burt has argued?[61] Or to put it more positively, was his protest a noble defence of the rights of the people? Did he refuse to appear at the trial as a political protest? More likely he failed to appear because he had been effectively silenced by threats. His case is therefore all the more significant. Walker was not an insignificant person, nor was he easily intimidated. He was a prominent merchant in Montreal – he would not have been appointed Justice of the Peace otherwise. Yet ultimately, the military won. And what had he done to earn their enmity? He had inconvenienced a military officer and he had failed to defer. He had been placed as a bulwark against the arbitrary actions of the military. If he failed to stand, perhaps it was because he had not the armour of legitimacy he needed to do so. He was vulnerable. The jails apparently could not hold his assailants. When he protested the removal of his trial to Quebec, he was suspended from the Commission of the Peace. How could he have confidence the courts would not fail him? One may feel sorry for poor Thomas Walker, but this in itself is a sign of his failure as a Justice of the Peace. Respect, not sympathy was what he needed to fulfil his function.

The trial at Trois Rivières may have yielded only one somewhat insignificant conviction but it produced more controversy. According to the representation made to the Governor and Council by nine Justices of the Peace, Thomas Lambe, formerly a Justice of the Peace, was insulted by the commanding officer of the 28th Regiment, Major Browne, because of his conscientious efforts towards finding those who attacked Thomas Walker:

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[60]Governor James Murray to the Board of Trade, 24 June 1765, PRO CO 42/53, f. 277.

[61]A.L. Burt, "The Mystery of Walker's Ear," Canadian Historical Review, vol. 3, (September 1922), p. 247.

> As the daring Insults offered to civil government by the inhuman and cowardly attack made last winter on a magistrate of Montreal and the subsequent Disorders which arose there have not only alarmed every individual among us, but also attracted the attention of our Mother Country, we cannot help observing that every person in a publick Capacity merits applause in Proportion to the Use he endeavours to make of his Power in detecting the perpetrators of these enormous offences. And as the conduct of Mr. Lambe on that Occasion deservedly met with the entire approbation of your Excellency & honors we are exceedingly sorry that his being left out of the last Commission of the peace, exposed him to be openly and cruelly reviled by Major Brown of the 28th Regiment in the face of the Supreme Court of Judicature of this Province. We therefor conceive ourselves indispensibly bound to represent this conduct of Mr. Brown to your Excellency & honors As the greatest Insult offered to every Department of civil government And to the Justices of the peace in particular who (if this is permitted to pass unnoticed) must be exposed to the like Treatment every Day in the Execution of the power given us As Magistrates.[62]

The Council appointed a committee to enquire into the matter. The committee heard a number of witnesses under oath who generally seemed to agree that in calling into question the evidence given by witnesses at Montreal, Major Browne had accused Lambe of adding to what the witnesses had actually said in the depositions he had taken. When challenged by Lambe, Browne said that he thought him capable of anything, that he had been "scandalously and infamously broke as a Magistrate" – that his being dismissed from the Commission of the Peace was proof of his bad conduct.

The Justices of the Peace were correct in their assessment that lack of support from above would expose the Justices to insult in carrying out their duties. Their effectiveness was dependent on their legitimacy and this was in turn dependent on support from above.

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[62]Representation of the Justices of the Peace read before the Governor and Council, 19 July 1765, PRO CO 42/53, ff. 303-304.

Major Browne's insolence was the direct result of the successful defiance of the civil authority by the military in the Thomas Walker affair.[63]

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[63]For his part, Browne wrote to the Governor desiring to know if the petition of the Justices was to be inserted in the Council books and sent home to London so that he might "send home proper affidavits about it to [his] friends to be laid before government." Major Arthur Browne to Governor James Murray, 24 July 1765, read before the Governor and Council 25 July 1765, PRO CO 42/53, ff. 304-307.

Chapter Seven - The Administration of Justice

In spite of his unwillingness to co-operate in the prosecutions of those accused of assaulting him, Walker was not content with the outcome of the trials. On the 26th of May 1766, Walker, newly returned from London, confronted Murray at the Council. According to Walker's deposition, Murray acknowledged the receipt of a letter from Secretary of State Conway the previous day.[1] Walker then asked Murray what steps he had taken in consequence of His Majesty's Order in Council of 22 November 1765. The Order in Council commanded the Governor to "cause diligent search to be made after such persons as have not yet been apprehended, or brought to tryall." Walker asked Murray whether he had secured or brought to trial Lieutenant Synge Tottenham, Sergeant Mee, John Mclaughlin or James Coleman, since they had been imprisoned on suspicion of having been principals in the assault on Walker. Murray replied that if the Secretary knew the whole story he might be of another opinion. The accused men had left the province and it lay with General Gage to secure them if he thought proper. Walker then demanded to be reinstated as a Justice of the Peace, "as a reparation of Honour & in virtue of his Excellency Secretary Conway's Letter." Murray refused. Walker made a deposition before Jean Dumas St. Martin, Justice of the Peace, on 11 June 1766 recounting the entire incident under oath.

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[1]Walker wrote to John Strettell in London on 20 June 1766:

The 28 Regt left Quebec about 10 days before my arrival so I went ashore & by Mr Allsopp presented my Letter to Govr Murray, what answer he made the Affidavit & Protest accompanying this will shew I deliver'd the Secretary of State's Letter to Col Massey, who gave out the enclos'd orders to the Troops under his Command, in short he came to my House the same day, examin'd some suspected soldiers before me, offer'd not only to protect & defend my person from Insult but the whole force of the Garrison to support my authority as a Magistrate, notwithstanding Gov Murray had refused to reinstate me, he look'd upon the letter as a positive Command, & from long service said he had learned Obedience to the Civil Authority, which as his Excellency Secy had justly observ'd the Troops were sent here to maintain, he spoke of the misfortune that befell me with much concern, & said he hop'd that no part of the Regt he had the Honour to Command had any share in it, in short he behav'd in a very genteel, Manly, manner & gave me such assurances, that I have dismiss'd all my fear (but not my cautions) for personal safety. Thomas Walker to John Strettell, Extract of a letter, 20 June 1766, PRO CO 42/86, ff. 172-173.

A month later Dumas was called upon once again to take a deposition, this time from one George Magavock [or McGovock], a soldier in the 28th Regiment. Magavock named Lieutenant Synge Tottenham and Captain Payne as principals in the assault, as well as Sergeants Rogers and Mee, and the soldiers Coleman, Mclaughlin, Ashman and Philip Castles. Magavock himself had been involved as a messenger to go between the officers in the street and the men directly involved in the attack. He declared that the intent had been to nail Walker's ear on the cross in the Parade but fear of pursuit scotched the plan.[2]

Some time passed before action was taken on Magavock's information but on 18 November 1766, Captain John Fraser and Lieutenant Simon Evans of the 28th Regiment, Captain John Campbell of the 27th Regiment, Captain Daniel Disney of the 44th Regiment, St. Luc La Corne and Joseph Howard were arrested on warrants granted on the strength of Magavock's deposition. Since none of these men were mentioned in his first deposition, a second must have been made. By this time the colony was under the charge of Lieutenant Governor Guy Carleton, sent to take Murray's place while he was in London. A new Chief Justice and Attorney General had been appointed as well. The accused were sent to Quebec where they immediately applied to Chief Justice William Hey for bail, but he declared the case not bailable. These were men of position and influence, Captain Fraser a Judge of the Court of Common Pleas, and memorials were drawn up and people assembled to go to Lieutenant Governor Carleton to ask him to grant bail to these respectable men. Hearing of this, Carleton sent some gentlemen to the assembling crowd to express his disapproval of such a plan and the assembly dispersed. The memorials, signed by many prominent residents of Quebec, were taken to Carleton.

Carleton received these memorials very frostily. As he reported to the Board of Trade:

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[2]Deposition of George McGovock, 11 July 1766, PRO CO 42/86, f. 169.

> This has been the first open attempt to disturb the Peace, and interrupt the free Course of Justice, since my arrival in the Province, and as it was headed by so many officers and Persons of some Distinction, I judged it the more necessary to deter all from such Disorders; and particularly to convince the Canadians, such Practices are not agreeable to our Laws and Customs, as they are taught to believe, and thereby induced to subscribe sentiments very different from their natural Disposition; for I look on such Methods of deciding Affairs as very dangerous in any of His Majesty's Provinces, but would become more especially so in this, was it suffered to grow up into Strength; for these Reasons I have removed Lieutenant Colonel Irving, and Mr Mabane Surgeon to the Garrison, from being of the Council, as they were zealously active in promoting these Disorders.[3]

Carleton reported that six of the nine members of the Council then in town had subscribed to the memorials and that the Chief Justice had suffered some insolence but that the measures taken "speedily restored every one to a proper sense of his Duty." Carleton's response to the assembling crowd is telling; he regarded anything which smacked of an assembly or an attempt to influence his actions by popular pressure as detrimental to his authority. He held no doctrine of the sovereignty of the people, treating them as subjects of the King, not as citizens of a state.

Carleton wrote to the prisoners explaining his reasons for not acceding to their wishes:

> As Unfortunately, the Person to whom the King has delegated His Authority in these Matters, has found himself obliged, in Compliance with his Duty, to make this final Declaration; my interposing my Authority, and arbitrarily wresting you out of the Hands of the Chief Justice of the King's Bench, would be irregular, illegal and in my Opinion what would merit His Majesty's high Displeasure.[4]

In his explanation, Carleton revealed very clearly his understanding of the nature of authority in the polity. Authority derived from the King who had delegated it to His servant, the Chief Justice. This person, mindful of his duty, was to act without

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[3]Lieutenant Governor Guy Carleton to the Board of Trade, 29 November 1766, PRO CO 42/6, ff. 1-2; Carleton to the Secretary of State, Precis of Letter in Entry Book, 29 November 1766, PRO CO 43/12, ff. 1-2;

[4]Lieutenant Governor Guy Carleton to Captain John Fraser, Captain John Campbell, Captain Daniel Disney, St Luc La Corne, Lieutenant Simon Evans and Joseph Howard, 26 November 1766, PRO CO 42/6, f. 10.

interference, even from Carleton himself. The Chief Justice was answerable only to the King who had granted him his authority. Carleton also derived his authority as Governor from the King – in the same manner as the Chief Justice. The implication is that he, too, is answerable only to the King for his actions. He will not interfere with the Chief Justice, nor will he tolerate any interference with his own performance of his duty as he sees it.

Carleton also wrote to Lieutenant Colonel Irving concerning his conduct in the affair. After stating that he believed that many of those who had subscribed to the memorials did not know the "evil Tendency of interfering in Numbers in the free Course of Justice," he went on to say that he did not expect that members of the King's Council should not know "that Law and Justice were to be obtained for the sake of Justice and Law alone." That these members of the Council should:

> exert themselves to procure Numbers ... to enforce such a Request, that Mr Mabane then one of the Council, and a Judge of the Common Pleas, should tell me in Excuse for this Conduct, that he thought the greater the Numbers, the more likely He was to succeed, as if by numbers He thought to intimidate, and so make me Swerve from my Duty ... this, as it directly tends to overturn Law, Justice, and good Government, appears to me very Extraordinary from a Councellor and a Judge.[5]

Although in this case the issue was the independent authority of the Chief Justice, for Carleton the legitimacy of government never rested on the will of the majority.[6] In fact, to accede to the popular will would be to be intimidated by force of numbers and would therefore signify the failure of the governor to act legitimately – and would overturn law, justice and good government.

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[5]Lieutenant Governor Guy Carleton to Lieutenant Colonel Paulus Aemilius Irving, 29 November 1766, PRO CO 42/6, ff. 12-13.

[6]He was only confirmed in this opinion by the rebellion of the thirteen colonies. Responding to a petition from some newly arrived loyalists who desired to elect the officers who would command them, he refused their request, writing, "I cannot but consider this as a very unjustifiable, not to say indecent attempt, and savouring too much of that unhappy spirit, to which America in general owes its present calamity, and these people in particular the distress of being driven from their homes." British Library, Add. MSS. 21699, f. 80.

The prisoners were returned to Montreal where they awaited their trial in the house of an eminent merchant. Many were prepared to believe in their innocence and that Walker, "was only meditating to disgrace, by the ignominy of a charge which he did not hope to support, all those towards whom he had been known to live, at the time when the dissention between the civil & military ran very high, with any notorious degree of unkindness." The Bastille, as they called the house where they were confined, became, according to the Chief Justice, a centre of great sociability, which further increased public sympathy for them. Walker, on the other hand, further alienated people by his "unyielding & surly carriage." By the time the Chief Justice arrived to try the case, Walker was under an "almost universal Prejudice."[7]

Fourteen more prisoners were to be sent up from New York, where the 28th Regiment was then stationed, to be tried for the same offence. Since they would not arrive before the assizes scheduled for the 28th of February 1767, Walker had applied for the case to be deferred until the September sessions. Chief Justice Hey informed him that the case might be deferred but that if it were, he would have to allow the prisoners bail. Walker decided to proceed at once.

The Grand Jury refused to bring in a bill of indictment against the first of the prisoners, Lieutenant Simon Evans. Chief Justice Hey, having been informed that they had examined the witnesses for the prosecution in "a partial and unbecoming manner" and that they had "in short tried the whole cause before themselves," instructed them that their duty was only to determine whether there was a probable presumption of guilt sufficient to bring the prisoner to trial. They were unanimous that they did not consider the evidence brought before them sufficient to try Evans for that offence.[8]

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[7]Chief Justice William Hey, 14 April 1767, PRO CO 42/27, f. 91-97.

[8]Ibid., f. 92.

Walker, "whose unhappy temper is under no controul," according to the Chief Justice, responded with accusations of partiality against the members of the Grand Jury, saying that "he expected no better from the moment he saw their names upon the Pannel." The insulted jury asked to be discharged but Hey urged them to reconsider:

> I told them that if it came as a motion on the Part of the crown I was very ready to declare that I saw no ground for it, that suggestions, of the kind I then heard, unsupported by proof, would not weigh with me to believe that Gentlemen of their Rank (& they were both French & English of the best the Province affords) could so far depart from their conscience & duty as to stop a public Enquiry into the foulest of all outrages, if there was the least reason to think the charge in that Indictment was true, that I thought they as little consulted the interest & honour of that Gentleman, as of the Public, in denying him a fair opportunity of being heard before his country[9]

The jury expressed some concern that a double charge against Lieutenant Evans had been brought to their consideration, but when the Chief Justice offered to permit them to reconsider it on two separate indictments, they refused. He informed them that if they insisted, he would discharge them immediately; they asked for time to consider this and returned the next morning willing to continue. They found the next bill of indictment, against Major Daniel Disney, a true bill.

Walker was not satisfied and asked that the extra jurors who had been called but not sworn be added to the Grand Jury to consider the remaining bills. The jurors protested this motion vehemently, "with an earnestness," Chief Justice Hey thought, "that betrayed their apprehensions of having any added to their number to break the unanimity in which they seemed to rejoyce & value themselves upon." Hey would not compel the other jurors to serve, once dismissed, but would not refuse them if they desired to serve. They refused, so the same Grand Jury brought in the next bill ignoramus. Further applications were made by the Attorney General, prosecuting the

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[9]Ibid., ff. 92-93.

case, to have the jury reformed or replaced, all of which were refused by Hey. He was persuaded that if he replaced the jury, he would have "thrown the whole Province into a confusion which might never have been terminated, & disappointed even those who demanded it of the end they proposed." He was sure that no man of any credit would have agreed to serve as juror if the Chief Justice dismissed the duly constituted Grand Jury.[10] To impugn the integrity of the jurors might have dragged the whole institution of the Grand Jury into disrepute.

The question throughout this controversy was the legitimacy of the Grand Jury. Walker claimed that they were biased; the Chief Justice seemed to agree, instructing them first in their duty and then professing not to believe that "Gentlemen of their Rank... could so far depart from their conscience and duty as to stop a public Enquiry into the foulest of all outrages," by refusing to indict if there were sufficient evidence to proceed. Walker wanted the jury changed, the Attorney General applied to have them replaced and the jurors themselves asked to be discharged. But Hey resisted all attempts, arguing that to change the jurors would "throw the province into...confusion." The confusion he dreaded and sought to avoid was the erosion of the legitimacy of the institution of the Grand Jury in the province. If the Chief Justice dismissed the duly constituted jury, he claimed, no man of credit would agree to serve in the future. There is an interesting combination of factors at work here. The jury has legitimacy because it is properly constituted, but it is also important that men of credit serve on it, to lend it their respectability. In other words, both formal and informal legitimacy are necessary to the smooth functioning of the institution. Formal legitimacy comes from the proper forms being followed in the calling of the jury, so as to avoid the appearance of bias or corruption. But if men of credit are not willing to serve on the Grand Jury, its weight in the community – its legitimacy – will be diminished.

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[10]Ibid., f. 93v.

Major Disney's trial lasted twelve hours, because of the difficulty of getting the witnesses through the crowd in the court and because of the efforts made by Walker to demonstrate the severity of his injuries in order to counteract the tendency to treat the whole affair as trifling. The case against Disney turned on Walker's ability to identify his assailants, even though disguised. Hey doubted Walker's testimony because by an affidavit made by him just after the assault, he expressed suspicion only of Lieutenant Scott and Quartermaster Graham, and declared "that he had no knowledge of any other Person whatsoever." Magavock's evidence was called into question, and eventually dismissed by the Chief Justice in his instructions to the jury because of his poor reputation and because of contradictions in his story. Neither of these cavils necessarily destroys his evidence. More telling perhaps, was the alibi that Major Disney claimed, his presence at a party testified to by four respectable citizens. The jury returned a verdict of Not Guilty. The Chief Justice summed up his report of the trial:

> Mr Walker's Violence of Temper & an inclination to find People of rank in the army concerned in this affair, has made him a Dupe to the artifices of a Villain whose story could not have gained credit but in a mind that came too much prejudiced to receive it, the unhappy consequence of it I fear will be that by mistaking the real objects of his Resentment, the Public will be disappointed in the satisfaction of seeing them brought to Justice.[11]

Ultimately, the public was disappointed – no-one but the unhappy Gustavus Hamilton was ever convicted in the assault on Walker or in the prison break.

The first two trials in the affair of Thomas Walker's ear demonstrate very clearly the deficiencies in the judicial system as first erected in the Province of Quebec. Although the third trial was no more successful than the first two in securing convictions, there were significant improvements in the process. Some, at least, of the problems had been solved. The new Chief Justice, William Hey, was both more knowledgeable of the law and more circumspect than his predecessor. The trial was held in Montreal, where the

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[11]Ibid., f. 97.

assault had taken place. The jury was drawn from Montreal as well. Presumably, the precept was properly signed this time. The 28th Regiment was no longer stationed in the colony so the possibility of the intimidation of the witnesses was removed. It seems probable that the men accused by Magavock were not involved in the assault, at least not directly. The guilty parties had left the province with the 28th Regiment. However, though the picture is somewhat clouded by the dubious nature of Walker's new accusations, the controversy between Walker and the jury in this trial suggests that the legitimacy of the new institutions was not yet securely established.

The system for the administration of justice that had been erected by the ordinance of 1764 had proved inadequate to the needs of the colony. It was the subject of criticism, some of it misguided, in 1766 when the British Attorney General, Charles Yorke, and the Solicitor General, William de Grey, submitted their report on the civil government of Quebec to the Privy Council Committee for Plantation Affairs. In this report, the law officers criticised the administration of justice in the colony at two major points. The first was:

> The attempt to carry on the Administration of Justice without the aid of the natives, not merely in new forms, but totally in an unknown tongue, by which means the partys Understood Nothing of what was pleaded or determined having neither Canadian Advocates or Sollicitors to Conduct their Causes, nor Canadian jurors to give Verdicts, even in Causes between Canadians only, Nor Judges Conversant in the French Language to declare the Law, and to pronounce Judgement; This must cause the Real mischiefs of Ignorance, oppression and Corruption, or else what is almost equal in Government to the mischiefs themselves, the suspicion and imputation of them.[12]

There is a clear acknowledgement of the need for the courts to be legitimate in the eyes of the people here, where the suspicion and imputation of oppression and corruption are nearly equated in effect with actual oppression and corruption.

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[12]Charles Yorke and William de Grey, Report of Attorney and Solicitor General Regarding the Civil Government of Quebec, 14 April 1766, British Library, Newcastle Papers, Add. MSS. 33030, ff. 226-235; Shortt and Doughty, p. 175.

The second criticism the Attorney General and Solicitor General made of the civil government in Quebec was "the Construction put upon his Majesty's Proclamation of Oct. 7th 1763." According to the law officers, the Proclamation had been misinterpreted,

> as if it were his Royal Intention by his Judges and Officers in that Country, at once to abolish all the usages and Customs of Canada, with the rough hand of a Conqueror rather than with the true Spirit of a Lawful Sovereign, and not so much to extend the protection and Benefit of his English Laws to His new subjects, by securing their Lives, Liberty's and propertys with more certainty than in former times, as to impose new, unnecessary and arbitrary Rules especially in the Titles to Land, and in the modes of Descent, Alienation and Settlement, which tend to confound and subvert rights, instead of supporting them.[13]

Again, the phrase "lawful Sovereign" indicates the intent to create a legitimate government, couched once again in the rhetoric of the King's paternal care for his subjects.

In their criticism, these British officials indirectly ratified Murray's attempt to preserve a court for the Canadiens – the Court of Common Pleas established by the ordinance of 1764 had provided the Canadiens with a court where Canadiens could act as advocates, where the French language could be used, where Canadiens could sit as jurors, and where Canadian civil law continued to operate. The lawyers seem to have been unaware of Murray's compromise and so criticised his system for the very faults it had remedied.

The problem was that Murray's ordinance of 1764 had not gone far enough. It could go no farther than it did, in fact, because it had to be made in the context of the Proclamation of 1763. Whether Yorke and de Grey liked it or not, the Proclamation had introduced English law into the colony. And it was only in June of 1765 that the Attorney General and Solicitor General had given their opinion that Roman Catholics residing in the newly acquired British colonies were not subject "to the Incapacities,

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[13]Ibid.

disabilities, and Penalties, to which Roman Catholicks in this Kingdom are subject by the Laws thereof."[14]

A practical solution for the problem of the administration of justice in the colony was drafted by the Board of Trade and the law officers after the report of 1766. It proposed Canadian law for cases of real property and inheritance, English criminal law and as for commercial law, Yorke and de Grey confidently asserted that "the substantial maxims of Law and Justice are every where the same," and that "the Judges in the province of Quebec cannot materially err, either against the Laws of England, or the antient Customs of Canada; if in such Cases they look to those substantial maxims."[15] This solution was embodied in a set of Additional Instructions to be sent to the Governor in Quebec, instructions which also authorized the governor to appoint Canadians to any office except judge of the superior court. However, these instructions were never sent – Lord Northington opposed them and with his resignation brought down the Rockingham ministry. Northington and Lord Mansfield, the Chief Justice of England, argued that after the Proclamation of 1763, where an assembly had been promised, the King could no longer legislate for the colony by council. An act of Parliament would be necessary.[16]

The administration of justice proved to be one of the most intractable of the problems in the colony. It was also regarded as one of the most essential aspects of government. The Earl of Shelburne, one of the two Secretaries of State, wrote to Carleton in June of 1767:

> As the right administration of government in Quebec is a matter of the greatest Importance to that Province, the Improvement of its Civil

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[14]Fletcher Norton and William de Grey, Report of Atty. and Sol. Gen. Re Status of Roman Catholic Subjects, 10 June 1765, Shortt and Doughty, p. 171.

[15]Report of Attorney and Solicitor General Regarding the Civil Government of Quebec, 14 April 1766, British Library, Newcastle Papers, Add. MSS. 33030, ff. 226-235; Shortt and Doughty, p. 177.

[16]Neatby, Quebec, pp. 54-55.

> Constitution is under the most serious & deliberate Consideration of His Majesty's Servants, & principally of His Majesty's Privy Council.
>
> Every light which can be procured on this subject will be material, as well as every Information which can tend to elucidate how far it is practicable and Expedient to blend the English with the French Laws in order to form such a system as shall at once be equitable and convenient, both for His Majesty's Old and New Subjects in order to the whole being confirmed & finally established by Authority of Parliament.[17]

Carleton responded with, as he said, the candour which the King's service required:

> least His Majesty's Servants, Employed in a Work of so great Importance, tho' of profound Knowledge and Judgement, for Want of having truly represented to them, Objects at so great a Distance, and in themselves so different from what is to be found in any other of His Dominions, I say, least without a true Representation of Things, the King's Service, . . .[lose the benefit] of the great Abilities of His Servants.[18]

The information Carleton felt so strongly the King's ministers needed had to do with the question of security. This was the foundation of all, he argued, and it was cause for grave concern. Fortifications were poor or non-existent. The King's forces in the colony numbered sixteen hundred and twenty-seven to which could be added perhaps five hundred men from among the King's old subjects settled in the province. The new subjects, by contrast, could field eighteen thousand men, half of whom had already seen service. There were in France or in the French service a hundred officers originating in Quebec. A further seventy among the seigneurial class who had served as officers of France remained in Canada. None of these had been employed in the service of the new King or offered any inducement to support his dominion.

> Gentlemen, who have lost their Employments, at least, by becoming His Subjects, and as they are not Bound by any Offices of Trust or Profit, we should only deceive ourselves by supposing, they would be active in the Defence of a People, that has deprived them of the Honors, Privileges, Profits and Laws, and in their Stead, have introduced much Expence,

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[17]Earl of Shelburne to Lieutenant Governor Guy Carleton, 20 June 1767, PRO CO 43/7, ff. 2-4.

[18]Lieutenant Governor Guy Carleton to the Earl of Shelburne, 25 November 1767, PRO CO 42/7, f. 21.

> Chicannery, and Confusion, with a Deluge of new Laws unknown and unpublished.[19]

The Lieutenant Governor here explicitly acknowledges the usefulness of appointment to office as a means for binding men's loyalty. Without it, the government must work doubly hard to earn that loyalty. It is in this context that the proposals for change in the civil administration must be understood. Legitimacy, the acceptance of the civil government as right and proper, was necessary to the security of the King's dominion over the colony.

According to Guy Carleton, the ordinance of 1764 had operated contrary to this principle. He clearly understood the ordinance to have introduced English law. The laws of New France, based on the seigneurial system of land tenure, and on French customs of inheritance, had been overturned:

> and Laws ill adapted to the Genius of the Canadians, to the situation of the Province, and to the Interests of Great Britain, unknown, and unpublished, were introduced in their Stead; a Sort of Severity, if I remember right, never before practiced by any Conqueror even where the People, without Capitulation, submitted to his Will and Discretion.[20]

In this short paragraph, Carleton raised a number of objections to the change in laws. First, he said that the English laws introduced were ill-suited to the genius of the Canadiens. What can this mean but that they were contrary to the accepted customs of the people? The French laws, though not without their faults, carried with them the legitimacy of long usage. They also formed part of a larger whole. Seigneurial tenure, dower rights, laws of inheritance, law regarding debt, church law regarding marriage – all of these fit together with a particular mode of social relations.[21] English law arose from

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[19]Ibid., ff. 22-23.

[20]Governor Guy Carleton to the Earl of Shelburne, One of His Majesty's Principal Secretaries of State, 24 December 1767, PRO CO 42/7, f. 52v.

[21]See, for example, Allan Greer, Peasant, Lord and Merchant: Rural Society in Three Quebec Parishes, 1740-1840 (Toronto: University of Toronto Press, 1985); Jan Noel, "New France: Les Femmes Favorisees," Atlantis: A Women's Studies Journal 6, 2, (Spring, 1981), 80-98; Louise Dechêne, Habitants et Marchands de Montréal au XVIIe siècle (Paris,

and presumed a quite different society. Carleton recognized this and respected the French system:

> This System of Laws established Subordination from the first to the lowest, which preserved the internal Harmony they enjoyed, untill our Arrival, secured the Obedience to the Supreme Seat of Government from a very distant Province.[22]

Here is the explanation for his claim that the English law introduced by the ordinance was ill suited to the situation of the province and to the interests of Great Britain. It is an essentially aristocratic view. The chain of command inherent in the seigneurial system was an efficient means of governing at a distance, where communication was slow and uncertain and where security was a prime concern.

Carleton's next criticism of the change in laws was that the new laws were both unknown and unpublished. Simple justice requires that a person have a reasonable opportunity to know the laws that are to govern his behaviour. The Canadiens were unfamiliar with English law and no effort was made to remedy that difficulty. Indeed, it is hard to see how that could have been accomplished, given the complexity of English civil law. It was not a matter of translating a few statutes.

Finally, Carleton referred to the capitulation. The colony of Quebec was conquered by English force of arms, but the conquest was by capitulation on certain terms. All of the colonial governors of this period, military men without exception, as well as the legal officers in England, regarded the terms of the capitulation as legally binding. They differed over the precise interpretation of the terms, but they never contemplated ignoring them. The two most important considerations were that the colonists were to retain their property and that they might practise their religion as far as the laws of Great

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Librairie Plon, 1974); John F. Bosher, "The Family in New France," in In Search of the Visible Past: History Lectures at Wilfrid Laurier University, 1973-1974, ed. Barry M. Gough (Waterloo: Wilfrid Laurier Press, 1975).

[22]Governor Guy Carleton to the Earl of Shelburne, One of His Majesty's Principal Secretaries of State, 24 December 1767, PRO CO 42/7, f. 52v.

Britain permit. It was their right to retain their property that came into consideration when the civil law was under discussion.

Carleton continued his critique of the change introduced by the ordinance of 1764:

> How far this Change of Laws, which Deprives such Numbers of their Honors, Privileges and Profits, and Property, is conformable to the Capitulation of Montreal, and Treaty of Paris; How far this Ordinance, which affects the Life, Limb, Liberty and Property of the Subject, is within the Limits of the Power His Majesty has been pleased to Grant to the Governor and Council; How far this Ordinance, which in a summary Way, Declares the Supreme Court of Judicature shall judge in all cases Civil and Criminal by Laws unknown and unpublished to the People, is agreable to the natural Rights of Mankind, I humbly submit; This much is certain, that it cannot long remain in Force, without a General Confusion and Discontent.[23]

Two new elements are mentioned here: the question of whether the ordinance exceeded the legal competence of the Governor and Council, who were restricted by their commissions to matters that did not affect the Life, Limb, Liberty or Property of the subjects; and the reference to the natural rights of mankind. Earlier in his letter to Shelburne, Carleton had argued that, although the laws and customs of the Canadiens were widely different from those of England, they were "founded on natural Justice and Equity as well as these."[24] This is a remarkable statement from an eighteenth-century British gentleman, most of whom elevated the British system of government above all others. Carleton was accused by the merchants of arbitrary rule; the accusation has been repeated by modern historians. He did understand society to be ruled from the top down -- monarchical and aristocratic rule; he did not see that as incompatible with restrictions on power or with just rule. It would be an oversimplification to posit a progressive, democratic merchant group fighting against a regressive, autocratic governor.

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[23]Ibid., f. 53.

[24]Ibid., f. 52.

Governor Murray's concession to the Canadiens in the ordinance of 1764, the Court of Common Pleas, where the Canadiens were permitted to have their cases settled according to their laws, had resulted in confusion because appeal from the Court of Common Pleas was to the Court of King's Bench, where English law was applied. According to Carleton, "A few Disputes have already appeared where the English law gives to one, what by the Canadian Law would belong to another."[25]

More significantly, the people had continued to "regulate their Transactions by their Ancient Laws, tho' unknown and unauthorised in the Supreme Court, where most of these Transactions would be declared Invalid."[26] Carleton's comment highlights an overlooked power held by the ordinary people – the power of custom. Because they continued to regulate their affairs according to the old laws, they posed a formidable challenge to the new system. It would impossible to overturn every such transaction.

Carleton noted that the Canadiens did not yet see the implications of the introduction of English law into the colony by the ordinance of 1764. No doubt this was because they could use Canadian law in the Court of Common Pleas. When they did understand that "their modes of Inheritance are totally changed," and that other differences in the laws would affect their property, Carleton predicted that they would be very upset.[27]

As it was, the biggest complaint was that the process was slow and expensive, as compared to the previous system. Prior to the conquest, the King's Courts sat every week at Quebec, Montreal and Trois Rivières. In 1767, the Courts sat three times a year at Quebec and only twice a year at Montreal. In addition, fees were much higher under the new system. Under the British system, almost all officials were remunerated in whole

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[25]Ibid., f. 53v.

[26]Ibid., f. 54.

[27]Ibid.

or in part by fees paid by those who required their services. Conyngham's career is only one example of the possible abuses under this system. Carleton claimed that in a province as impoverished as Quebec, the whole system of fees was oppressive to the people. In his letter to Secretary of State Shelburne, he began a campaign to have the principal officers of government receive salaries in lieu of fees, and to restrict the inferior officers to the fees which had been in place under the French regime:

> in order to remove the present Reproach, that our English Justice, and English Offices are Calculated to drain the People of the little Substance they have left, as well as serve as a Barrier, to secure the King's Interests, at this Distance from the Throne, from the pestilential Dangers of Avarice and Corruption for Ages to come.[28]

Carleton recognized that relatively high salaries would be necessary to induce able "Gentlemen of the Law," who could understand French, to come to the colony. He argued that it was more essential that men of character be found for Quebec than for any of the King's other provinces, because in Quebec, "every Fault...of the Man becomes a national Reproach." He was willing to settle for men without legal training, if such could not be found:

> It will be better for the Province, to be satisfied with any Man of sound Sense and Probity, it can afford, who with good Intentions and the Advice and Assistance of [the Chief Justice and the Attorney General], may prove of more Service, than an ignorant, greedy or Factious Set.

Sound sense and probity, then, were more important than legal training. This is a view more in keeping with the older model of social relations where character matters more than specific training. It fits well with Carleton's other actions – his intolerance for anything that smacked of an elected assembly, his support of the seigneurs as leaders of the society and his impatience with the merchants. Some, Hilda Neatby in particular, have ascribed this constellation of characteristics to an autocratic temperament. But it may be more useful to see Carleton as a representative of a particular understanding of social relations, an aristocratic understanding.

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[28]Ibid., f. 55v.

Nonetheless, it was Carleton who recommended the replacement of the fees system with fixed salaries. This could be regarded as a harbinger of a modern, professional civil service, whose officials do their duty not out of a sense of loyalty to their patron, be he the King or some lesser personage, nor in the hope of multiplying their fees, but out of professional pride.

Carleton's criticism of the fees system began with the expence laid on a people ill able to bear it, but ended with the danger to the authority, or legitimacy, of the government posed by corrupt officials. A number of incidents show that this was no idle fear. Edward Chinn, the deputy provost marshall of Montreal had to be restrained from selling the permits to carry fusees, contrary to his instructions.[29] Carleton reprimanded Thomas Ainslie, collector of His Majesty's Customs, for charging excessive fees.[30] The abuses practiced by Williams Conyngham and turned up during the course of the Thomas Walker affair have already been mentioned. Even the courts of the Justices of the Peace came under criticism for corruption. This was especially dangerous in Quebec, since the officials were almost entirely drawn from the British subjects, and as mentioned above, "every Fault of the Man became a National Reproach."

In August of 1767 the Lords of the Committee of Council for Plantation Affairs presented their report to the Privy Council on the subject of the Courts of Judicature for Quebec. The Committee had the Instructions drafted in 1766 before them, as well as the report of the Attorney and Solicitor General, and presumably Carleton's letters on the subject. Nonetheless, they were of the opinion that the draft Instructions were so general, "and so unsupported by any specific or particular proof of any Grievances in Judicature," that they could not advise the King to approve of them. They thought it necessary to

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[29]Quebec Gazette, 20 June 1765.

[30]Neatby, Quebec, p. 97.

obtain from the King's servants in Quebec, "precise, solemn & authentic Information of the Defects if any that are now existing, together with the Remedies, Reforms, Additions, or Alterations which they would propose." To this end, they recommended that the Governor, or Lieutenant Governor, the Chief Justice and the Attorney General of the Province prepare a report on the subject and that a "fit and proper person" be sent out to explain their instructions and bring back the report. The King and the Privy Council approved this recommendation and ordered the Earl of Shelburne to give the necessary directions.[31] Maurice Morgann was the fit and proper person chosen by Shelburne and he was given a year to accomplish his task. It was not until 17 December 1767 that Shelburne wrote to Carleton directing him to prepare the report ordered by the Privy Council in August.[32]

Chief Justice William Hey, Attorney General Francis Maseres and Governor Guy Carleton could come to no agreement so several reports were ultimately delivered to the Secretary of State. Carleton advocated retaining Canadian civil law and English criminal law. Hey and Maseres thought it necessary to retain only those parts of the French civil law which pertained "to the tenure, alienation, dower and inheritance of landed property and the distribution of the effects of those persons who die[d] intestate."[33] Maseres did think that it would be wise eventually to introduce the principle of primogeniture into the distribution of the landed property of those who died intestate, arguing that the

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[31]Resolution of Privy Council as to Information Required Concerning the Province of Quebec, 28 August 1767, PRO CO 43/7, ff. 7-9.

[32]Earl of Shelburne to Maurice Morgann, PRO CO 43/7, ff. 11-12; Earl of Shelburne to Governor Guy Carleton, 17 December 1767, PRO CO 43/7, ff. 9-10.

[33]Francis Maseres, "A Draught of an Intended Report of the Honourable the Governor in Chief and the Council of the Province of Quebec to the King's most Excellent Majesty in his Privy Council concerning The State of the Laws and the Administration of Justice in that Province," in A Collection of Several Commissions and Other Public Instruments, collected by Francis Maseres (London: W. & J. Richardson, 1772; Republished 1966 by S.R. Publishers), p. 49.

Canadian custom led to excessive subdivision.[34] In this, as in all things, Maseres regarded the British system as superior.

In his draft report, which Carleton rejected, Maseres was preoccupied with showing that English law had already been introduced into the colony. He detailed various instruments that he argued had accomplished this – from statutes of the reign of Elizabeth to the commission and instructions given to Governor Murray. He cited examples to show that English civil law had been assumed to be in force by both Canadian and British subjects of the King. He did acknowledge that proceedings in the Court of Common Pleas were most often conducted in French, according to French forms and by Canadian attorneys.[35] In his remarks on the validity of the legal instruments that introduced English law into the colony, he expressed doubt that the Governor and Council had the authority to direct the Court of King's Bench to determine civil and criminal causes according to the laws of England, as was done in the ordinance of 1764, without the consent of a legislative assembly. On this basis the introduction of English law might be called into question; however, he asserted, the other instruments, the articles of capitulation, the Treaty of Paris and the Proclamation of 1763, were sufficient in themselves to have introduced English law.[36]

Maseres seems to have raised the doubt about the authority of the Governor and Council only to dismiss it, since the other instruments were sufficient, in his view, to introduce the English law. Perhaps he had another reason for mentioning it – criticism of the failure to call an assembly. His arguments throughout the draft report support the introduction of English laws and institutions into the colony. In this he was at one with

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[34]Francis Maseres, "The Opinion of the Attorney General of the Province of Quebec concerning the Report made by his Excellency Brigadier-General Carleton," in A Collection of Several Commissions and Other Public Instruments, collected by Francis Maseres, pp. 55-56.

[35]Maseres, "Draught of an Intended Report," p. 23.

[36]Ibid., pp. 24-27.

the British merchants and at odds with the Governor. In 1770, "the British Freeholders, Merchants and Traders," petitioned the King for an assembly which would, they argued:

> strengthen the hands of Government, give encouragement and protection to Agriculture and Commerce, encrease the Publick Revenues, and...will in time under Your Majesty's Royal influence be the happy means of uniting your new subjects in a due conformity and attachment to the British Laws and Constitution and rendering the conquest of this extensive and populous country truly glorious.[37]

The same year some of His Majesty's new subjects petitioned for the restoration of French law and custom.[38] The British merchants clearly saw the future of the colony to be one in which the Canadians would learn to submit to British law and custom; the Canadians begged that the King in his paternal care would restore to them the French law and custom.

Carleton had dismissed previous petitions for an assembly. In a letter to Shelburne in January of 1768, he related two incidents, the first where three or four of His Majesty's old subjects had brought him the draft of such a petition and he had told them that he objected to "great numbers signing a Request of any Kind, that it seldom conveyed the sincere Desire of the Subscribers, that it had as Appearance of an Intention to take away the Freedom of granting or refusing the Request." He claimed to have no objection to assemblies in general but found himself unable to form a plan that would work in the colony's particular situation and asked them to submit such a plan. The second incident he attributed to a disgruntled keeper of an alehouse, John McCord. He had, according to Carleton, put up a few sheds near the barracks to sell liquor to the soldiers.

> Finding that his lucrative Trade has lately been checked, by inclosing the Barracks to prevent the Soldiers getting drunk all Hours of the Day and Night, He has commenced Patriot, and with the assistance of the late

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[37]Petition for a General Assembly, 1770, Shortt and Doughty, p. 291.

[38]Petition for the Restoration of French Law and Custom, 1770, Shortt and Doughty, pp. 292-294.

> Attorney General, and three or four more... are at work again for an Assembly.[39]

According to Carleton, the better sort of Canadians feared popular assemblies, as well they might, if they were to be excluded from participation by reason of their religion.

Carleton went on in this letter to state very clearly his understanding of the difficulties of transplanting the ancient British Constitution to the colony:

> It may not be improper here to observe, that the British Form of Government, transplanted into this Continent, never will produce the same Fruits as at Home, chiefly because it is impossible for the Dignity of the Throne, or Peerage to be represented in the American Forests; Besides, the Governor having little or nothing to give away, can have but little Influence; in Place of that, as it his Duty to retain all in proper Subordination, and to restrain those Officers, who live by Fees, from running them up to Extortion; these Gentlemen, put into Offices, that require Integrity, Knowledge and Abilities, because they bid the highest rent to the Patentee, finding themselves checked in their Views of Profit, are disposed to look on the Person, who disappoints them, as their Enemy, and without going so far as to forfeit their Employments, they in general will be shy of granting that Assistance, the King's Service may require, unless they are all equally disinterested or equally Corrupt. It therefore follows, where the executive Power is lodged with a Person of no Influence, but coldly assisted by the rest in Office, and where the two first Branches of the Legislature have neither Influence, nor Dignity, except it be from the extraordinary Characters of the Men, That a popular Assembly, which preserves it's full Vigor, and in a Country where all Men appear nearly upon a Level, must give a strong Bias to Republican Principles.[40]

As Carleton understood it, then, the British form of government consisting of the three branches of government, the monarchy, the aristocracy and the representatives of the people, was out of balance in the colony. Neither of the first two could be adequately represented in Quebec. In addition to these deficiencies, the governor, as the executive power in the colony, lacked the necessary means of securing adherence to his policies –

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[39]Governor Guy Carleton to the Earl of Shelburne, 20 January 1768, Shortt and Doughty, pp. 205-206.

[40]Governor Guy Carleton to the Earl of Shelburne, 20 January 1768, Shortt and Doughty, pp. 205-206.

patronage, or the distribution of offices. It was an accepted commonplace of eighteenth-century politics that patronage was necessary to government. How else was loyalty or at least "proper Subordination," to be secured? Lacking this essential tool, the Governor inevitably had to cope with faction and discontent. In such a situation, the creation of an assembly would be dangerous, he argued, because there would be none of the usual restraints on its republican tendencies.

It is not surprising, therefore, that Carleton rejected Maseres' draft. Instead, Maurice Morgann was asked to compose the report. Morgann's report was more to the liking of the Governor. But Chief Justice Hey also prepared a report, very similar to Morgann's. Morgann wrote to Shelburne concerning Hey's report:

> It was indeed undertaken upon the motive, and that motive was frankly communicated to me, that it would not appear decent that a report on such a subject sho'd be drawn up by a Stranger and that it wo'd carry with it if such a fact sho'd be known less Weight and Dignity and Argument that I thought reasonable and co'd not help acquiescing in.[41]

Ultimately, Carleton combined the two into a final report, which Morgann claimed differed very little from the one he had drafted. In it, he recommended the retention of Canadian civil law, with all civil cases to be settled by the Court of Common Pleas. The Court of King's Bench would handle criminal cases only and use English criminal law. He also suggested the appointment of seigneurs and militia captains as justices of the peace and the publication of Canadian law.[42] An attempt to create a digest of the French civil law had been attempted in 1767, but agreement between the Canadian legal experts had proved elusive.[43]

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[41]Maurice Morgann to the Earl of Shelburne, 30 August 1769, Appendix E, The Maseres Letters, 1766-1768, edited by W. Stewart Wallace, (Toronto: Oxford University Press, Canadian Branch, 1919).

[42]Neatby, Quebec, p. 106.

[43]Ibid., p. 105.

Carleton himself received permission to return to England on leave and arrived in the summer of 1770, just a few months after Morgann and his report. Maseres had preceded him to England the previous year. So the ministers responsible for crafting a solution to the difficulties in Quebec had access to a good deal of expert advice. They also had received petitions from the Canada Committee, a committee of London merchants interested in the trade of Quebec, asking for the establishment of an assembly, the second of these suggesting that a number of Canadians be admitted to both the Council and assembly.[44]

The Board of Trade had prepared a report of its own on the orders of the Privy Council. This report was completed 10 July 1769, but no action was taken on it, the Council preferring to wait for the report from Quebec. The report of the Board of Trade was clear in its criticism of the state of the constitutional settlement for the colony:

> No provision has been made for establishing such a reasonable Revenue as may be adequate to the necessary expenses of Government, the whole of which is now a burthen on His Majesty's Treasury here. The Roman Catholic religion, though barely tolerated by the Treaty, remains without any regulation, reform or control whatever, and that of the Mother Country without any provision or support. Besides these capital objects, there are many other constitutional establishments and necessary services for which no provision either has been or can be made in the present state of the Colony; and it has even been found necessary to disallow several Ordinances of the Governor and Council, in Matters merely of local regulation and internal economy, from a considerable Want of a due authority to enact them.[45]

The Lords Commissioner for Trade and Plantations saw the only solution to be the establishment of full legislative authority within the colony – in short, an assembly. This would have been accomplished by the Proclamation of 1763 and the Governor's Instructions, they argued, except for the unfortunate circumstance of the insertion in the

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[44]Burt, Quebec, p. 164.

[45]Report of Lords Commissioners for Trade and Plantations relative to the State of the Province of Quebec, 10 July 1769, Shortt and Doughty, p. 266.

Governor's Commission of the restriction, "that no person should sit in the Assembly who had not subscribed the Test." This circumstance had made an assembly impracticable and the powers of government confined to the Governor and Council, whose authority was insufficient to make the regulations necessary for the colony.

The Lords of Trade were not, however, prepared to admit the numerically superior Catholic Canadians to full participation in an elected assembly without restriction. That would have rendered the votes of British subjects in the colony nugatory. Instead, after asserting that all arrangements must be regarded as experimental, "open...to such alterations, as a Variation in the state and circumstances of the Colony shall from time to time require," they proposed a scheme of representation that would yield roughly equal numbers of Protestants and Catholics. Under this scheme, the members chosen for the cities of Quebec, Montreal and Trois Rivières would have to subscribe to the Test, whereas the members chosen for the rural Districts of Quebec, Montreal and Trois Rivières would not. Presumably as a further precaution against republicanism, the members elected for the rural districts would have to be seigneurs.[46]

With respect to the administration of justice, the Board of Trade recommended the implementation of the instructions of 1766. They made a number of recommendations regarding the religious affairs of the colony and closed their report with a detailed plan for a civil establishment, costing about ten thousand pounds per annum. This plan replaced the fees system with salaries for officials, the reform advocated so strenuously by Governor Carleton. With the assistance of the proposed assembly, the Governor would have the authority to raise the necessary revenue.[47]

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[46]Ibid., p. 268.

[47]Burt, Quebec, p. 166.

Prior to his departure for England in 1770, Carleton and the Council of Quebec had passed an ordinance to solve some, at least, of the problems in the administration of justice in the colony. Under the ordinance of 1764, Justices of the Peace had been allowed to determine causes where the amount at issue did not exceed five pounds, when sitting alone and causes up to thirty pounds when sitting in quarter sessions. Murray had complained of the dearth of substantial and respectable candidates for the position, and the careers of some of the first appointees at Montreal were short, two of them being incapacitated by debt. Apparently the situation had not improved. Carleton claimed, "Not a Protestant butcher, or publican became bankrupt who did not apply to be made a justice."[48] These men became Justices of the Peace in order to collect the fees of office. Small wonder that they were accused of corruption and of stirring up disputes for the fees that might accrue. As Carleton reported to the Earl of Hillsborough, one of His Majesty's Principal Secretaries of State in 1770:

> When several from Accidents, and ill-judged Undertakings, became Bankrupt, they naturally sought to repair their broken Fortunes at the Expence of the People; by a Variety of Schemes to increase the Business and their own Emoluments, Bailiffs, of their own Creation, mostly French Soldiers, either disbanded or Deserters, dispersed though the Parishes with blank Citations, catching at every little Feud or Dissension among the People, exciting them on to their own Ruin, and in a manner forcing them to litigate, what, if left to themselves might have been easily accommodated, putting them to extravagant Costs for the Recovery of very small Sums, their Lands, at a Time when there is the greatest Scarcity of Money and consequently but few Purchasers, exposed to hasty Sales for Payment of the most trifling Debts, and the Money arising from these Sales consumed in exorbitant Fees, while the Creditors realize little Benefit from the Destruction of their unfortunate Debtors. This, My Lord, is but a very faint Sketch of the Distresses of the Canadians, and the Cause of much Reproach to our National Justice, and the King's Government.[49]

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[48]Governor Guy Carleton to the Earl of Hillsborough, 25 April 1770, PRO CO 42/8, f. 5v.

[49]Governor Guy Carleton to the Earl of Hillsborough, 28 March 1770, PRO CO 42/7, ff. 131-132.

By the ordinance of February 1770, all civil jurisdiction was taken out of the hands of the Justices of the Peace and given to the Court of Common Pleas. Henceforward, there would be two Courts of Common Pleas, a new one being created for Montreal, and both would sit continuously, except for vacations and when the judges were to go on circuit in the country.[50] The ordinance also addressed the other most pressing problem in the administration of justice, as Carleton saw it: the seizure and sale of both goods and lands of debtors for small debts. No houses or lands could be sold for debts of less than twelve pounds, nor could they be sold if the debtor had other personal property which could be sold to settle the debt. If houses of land were to be sold for debt, the sale could not take place for six months after the advertisement of such a sale. This provision would have increased the chances of the debtor receiving a fair return on the sale of his property, which did not occur if the sale was hasty.[51]

The removal of civil jurisdiction from the justices of the peace represents a tacit admission that one of the fundamentals of the British constitution had failed in Quebec. The justices who were appointed did not carry sufficient weight to add dignity to the office nor was the process of their appointment sufficient to grant them the legitimacy they lacked in themselves. They had neither the legitimacy of status that had worked in the past nor the legitimacy that would accrue to professional civil servants in later times. They were not the substantial leaders of the community, who could resolve disputes by the interposition of their own influence, upon which the English system was predicated. Many were not able to rise above the temptations of their offices. This recalls Murray's complaint about his first Chief Justice and Attorney General – that they were needy in their circumstances. In eighteenth-century terms, to be needy in one's circumstances meant that one could not be disinterested.

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[50]An Ordinance for the More Effectual Administration of Justice and for Regulating the Courts of Law in This Province, 17 January 1770, Shortt and Doughty, pp. 280-290.

[51]Ibid.

Significantly, the ordinance was vehemently opposed by the merchants in the colony, who claimed that it would "be of great hurt to the general Interests of this Country, and [would] unavoidably ruin every Merchant in it."[52] Some fifty merchants of Quebec drafted a remonstrance against the ordinance, which they delivered to the Governor and Council. Needless to say, they were not received very cordially. Governor Carleton rebuked them for "sending about Hand Bills to invite the People to assemble in Order to consult upon Grievances." The Governor claimed to be astonished that they did not see that they were acting against their own interests, "for if in Tumultuous Meetings, or by the Dint of Numbers only, Laws were to be made or abrogated, the lowest Dregs of the People, and the most ignorant among them, would of course become the Lawgivers of the Country."[53]

Like their counterparts to the South, the merchants were more fearful of the tyranny of the Governor than of the "dregs" of the people, probably because they assumed that they themselves would be the chief lawgivers. This would certainly have been true if the Canadiens were excluded from participation in any legislative Assembly.

The merchants' first objection to the ordinance was the power given to judges to determine small debts. As their memorial stated:

> The Scope and Tendency of this Ordinance is apparently to invest the Officers of the Crown with such a degree of Power and discretionary Authority as would inable a few in publick Employments among us to become the sole arbiters of the whole property of the Province, and introduce such a State of Slavery and dependence among us as has ever

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[52]Extract of a letter from Quebec dated 11 April 1770, enclosed in a Petition to the Lords Commissioners for Trade and Plantations from the Merchants of London Trading to Quebec, 11 July 1770, PRO CO 42/7, ff. 127, 128.

[53]Governor Guy Carleton to the Earl of Hillsborough, One of His Majesty's Principal Secretaries of State, 25 April 1770, PRO CO 42/8, ff. 3-4. Carleton also claimed that the Canadians did not support the merchants in their opposition and that some had been insulted as a result.

> been deemed dangerous to, and inconsistent with the Freedom of a Trading Body.[54]

The merchants feared the very thing that Carleton claimed was necessary to a balanced government – the appointment of salaried officials dependent on the Governor. They showed little trust in the judges. Of course, these judges would replace the Justices of the Peace who were almost all merchants and so inclined to see things from the merchants' point of view, especially matters of debt.

The merchants objected most vehemently to the changes to the process for the recovery of debt. According to Carleton, in the previous four or five years between three and four hundred families had been "turned out of their Houses, obliged to sell the Lands, and seek new Habitations," because their property was sold for debt, sometimes for paltry sums.[55] This was the evil the ordinance was intended to alleviate. However, the merchants argued:

> The Effects that would follow from the uncommon indulgence granted by this Ordinance to Debtors, must naturally be an indifference and disregard among the lower Class for their Creditors, the want of a due Spurr for them to discharge their debts, an opening for them in many instances to commit Frauds and Villainies, and not that necessity as formerly for the industrious exertion of the Husbandman to discharge his Debts.[56]

They denounced the provision of the ordinance that lands could not be sold for debts under twelve pounds as unjust to creditors and as "inconsistent with good policy." They argued that it would be better for the defendant to keep his tools and work animals and have his lands sold "which would of course fall into more able hands." Since the ordinance did not allow for imprisonment for debt, the merchants feared that no-one would feel obliged to pay their debts.

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[54]Memorial of the Merchants and other Inhabitants of the City of Quebec, 10 April 1770, PRO CO 42/8, ff. 7-10.

[55]Governor Guy Carleton to the Earl of Hillsborough, 25 April 1770, PRO CO 42/8, ff. 3-6.

[56]Memorial of the Merchants and other Inhabitants of the City of Quebec, 10 April 1770, PRO CO 42/8, ff. 7-10.

The merchants also objected to the continuous sitting of the Court of Common Pleas, arguing that the lack of regular adjournment would permit suit, judgement and execution to take place within ten days and therefore, "prove very distressing to the Credit of many People in Trade, who may not have it immediately in their power to Satisfy a demand that may come against them, and may be made use of by a Corrupt Judge or Cruel and Spiteful Creditor to the ruin of a man in Trade."[57] They seemed to ask for themselves an indulgence which they were unwilling to grant to their debtors.

The Governor and Council in framing the ordinance were intent upon solving the problems that vexed the colony and eroded the legitimacy of the government in the eyes of the Canadiens. The merchants regarded the measures taken as a betrayal of their interests and were quick to urge their contacts in London to block the ordinance. Legislation that did not reflect their interests could not be legitimate legislation. They believed that an Assembly would not pass such unsatisfactory legislation. But they also criticized the measures taken by the Governor and Council because they did not have the legitimacy conferred by a representative Assembly. They regarded themselves as citizens who ought to have a role in government, rather than as mere subjects of the King.

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[57]Ibid.

Chapter Eight - As Far as the Laws Permit

The conception of the nature of English society held by the British elite in the eighteenth century was that it was monarchical, aristocratic and Anglican. The civil administration which the Governors attempted to create in Quebec was patterned after this conception. Whether in actuality English society followed the pattern or not, it was certainly what these men thought ought to exist in the colony of Quebec. The appeal to the monarchy as the origin of legitimate authority is clear in the various rituals by which civil administration was introduced into Quebec, as well as in the oaths of office and the commissions of the Governors. The aristocratic ethos is plain in the assumptions as to who was legitimately entitled to participate in government and to perform the various functions of the administration. Both monarchy and aristocracy are based on status conferred by birth and on hierarchical organization – the social relations inherent in a kingdom. Paternalism and the demand for due submission are integral to this mode of social organization. Both were clear features of the model of civil administration which the governors sought to set up in Quebec. However, they experienced substantial difficulties in the implementation of these principles, as the foregoing chapters have shown. The third element of the description – that English society was Anglican – proved to be even more difficult to apply in the colony than the other two.

The colonial situation differed from the English model in part because the landed gentlemen, the seigneurs, could not perform their traditional functions in the society because they were excluded from participation by virtue of their Catholicism. English society after the Glorious Revolution was self-consciously anti-Catholic. As Linda Colley has argued in her recent book:

> Protestantism was the dominant component of British religious life. Protestantism coloured the way that Britons approached and interpreted their material life. Protestantism determined how most Britons viewed

> their politics. And an uncompromising Protestantism was the foundation on which their state was explicitly and unapologetically based.[1]

The hostility to Catholicism was rooted in the threat posed by Jacobitism in the early part of the century. Attempted invasions in support of the Stuarts in 1708, 1715 and 1745 made it clear that the threat was not only an internal one. Britain remained at war with Catholic Europe throughout much of the century.[2]

But there was more to British anti-Catholicism than this. Catholicism could not be tolerated because it was itself intolerant. According to Lois Schwoerer, the fear that animated anti-Catholicism was that "if Catholics were tolerated they would use that status to destroy a Protestant government, exercise their belief in the right to depose kings, turn the country over to the Pope to whom they owed allegiance and confiscate the property of the nation."[3] Catholic persecution of Protestants in Europe confirmed the belief that Catholicism could not safely be tolerated.[4]

Catholics, to the eighteenth-century English mind, were inherently untrustworthy. Because they regarded the Pope, rather than the King, as the highest earthly authority, their loyalty was doubtful. And then there was the matter of the sacredness of oaths, absolutely crucial for the stability of society in the eighteenth century, according to Locke.[5] Because Catholics could be absolved by an earthly authority, their oaths could not be trusted. Therefore, they were untrustworthy members of society.

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[1]Colley, Britons, p. 18.

[2]Ibid., p. 24; See also C.M.Haydon, "Anti-Catholicism in Eighteenth-Century England." D.Phil., Oxford University, 1985.

[3]Lois G. Schwoerer, "Locke, Lockean Ideas and the Glorious Revolution," Journal of the History of Ideas, 51 (Oct-Dec 1990): 546.

[4]Colley, p. 23.

[5]Schwoerer, p. 545.

Catholicism was dangerous but eighteenth-century colonial administrators could not conceive of a secular society, where one's religion was a matter of indifference. How, then, were they to manage their relations with the Catholic church in Quebec?

First, it should be understood that their understanding of the church and its role in society was an Erastian view. The church was part of the civil administration. No separation of purely private religion and secular society was contemplated. It was not private religious experience or belief that mattered to them as colonial administrators. It was not the veneration of saints or of the Blessed Virgin nor the Mass that concerned them. It was, instead, the obedience to an authority other than the King. What mattered was the church's role in the maintenance of the social order. The Canadiens had been granted the free exercise of their religion by the Articles of Capitulation and the Treaty of Paris. The problem was to incorporate that guarantee into an Anglican kingdom.

The Earl of Egremont wrote to Governor Murray in 1763 concerning this difficulty:

> For tho' the King has, in the 4th Article of the Definitive Treaty, agreed to grant the Liberty of the Catholic Religion to the Inhabitants of Canada; and tho' His Majesty is far from entertaining the most distant thought of restraining His new Roman Catholic Subjects from professing the Worship of their Religion according to the Rites of the Romish Church: Yet the Condition, expressed in the same Article, must always be remembered, viz.: As far as the Laws of Great Britain permit, which Laws prohibit absolutely all Popish Hierarchy in any of the Dominions belonging to the Crown of Great Britain, and can only admit of a Toleration of the Exercise of that Religion.[6]

Murray was urged to avoid anything that would give unnecessary alarm or disgust to the King's new subjects, but also to watch the priests very closely and "remove...any of them, who shall attempt to go out of their sphere, and who shall busy themselves in any civil matters."[7]

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[6]The Earl of Egremont to Governor James Murray, 13 August 1763, Shortt and Doughty, p. 123.

[7]Ibid.

Even before the establishment of civil government in 1764, the question of religion was addressed by the military governors. Thomas Gage, in his Report of the State of Montreal in 1762, wrote that the only causes of hostility towards British rule were Canadian concerns about the French paper money and concerns about their religion:

> The People having enjoyed a free and undisturbed Exercise of their Religion ever since the Capitulation of the Country, their fears in that particular are much abated, but there still remains a Jealousy; It is to be hoped that in Time this Jealousy will wear off; and certainly in this, much will depend upon the Clergy; Perhaps methods may be found hereafter to supply the Cures of this Country with Priests well affected, But whilst Canada is stocked as She now is, with Corps of Priests detached from Seminaries in France, on whom they depend, and to whom they pay obedience, It is natural to conceive, That neither the Priests or those they can influence, will ever bear that Love and Affection to a British Government, which His Majesty's auspicious Reign would otherwise engage from the Canadians, as well as from His other Subjects.[8]

To Gage, then, the Catholicism of the Canadians was a potential source of disaffection. Much of the problem would be obviated by time, if the Canadiens found that the British did not intend to interfere with the practice of their religion. Gage also suggested a measure which was to become a hallmark of British policy towards the Catholic Church – the severance of the ties between the Canadian church and its parent body. This would seem a reasonable measure to a member of a nationally defined church such as the Church of England. It is doubtful that it seemed as reasonable to members of a church that set itself above kings and nations.

General James Murray, then military governor of Quebec, also wrote a Report of the State of his government in 1762. After a detailed and lengthy list of the various Catholic institutions in the colony, he offered a number of Observations, which may be construed as his policy recommendations on the subject of the religion of the Canadians. His first observation echoed Gage's:

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[8]Thomas Gage, Report of the State of Quebec, 20 March 1762, British Library, King's MSS. 205, ff. 148-156.

> The Canadians are very ignorant and extremely tenacious of their Religion, nothing can contribute so much to make them staunch Subjects to His Majesty, as the new Government's giving them every Reason to imagine no alteration is to be attempted in that Point.[9]

Murray also pointed out that under the French regime, care had been taken to ensure that a good proportion of the clergy were French, "especially the dignified part." He noted that if the British wished to stop the importation of more French clergy it would be necessary to encourage Canadiens to take the place of the French clergy. For this to be accomplished it would also be necessary to fill the Quebec See, "as without a Bishop, there can be no Ordination." It is interesting to note that the only hindrance he saw to this proposal was the fact the See was unendowed, so some alternate means of support would have to be found. More concerned with the practicalities of governing than with its theoretical justification, Murray saw no inconsistency in a self-consciously Protestant government arranging for the appointment and consecration of a Catholic Bishop. He also recommended that the appointment of clergy to parishes should be taken over by the King or the Governor, "for the sake of keeping them in proper subjection." Since the Jesuits were unpopular in the colony, Murray suggested that the order could be easily removed whenever the government thought proper and that their Estates might provide for the Bishop. Here again the intent was to permit the Canadians to worship as they chose, but to separate them from the influence of Rome or France. The mode of worship was a matter of indifference to the government; the political influence of the clergy was not.

Murray suggested that assisting the people to rebuild their Great Church, "would much ingratiate their new Masters with them." He was quite supportive of the Seminary, arguing that it should be preserved and encouraged because it educated the youth and fit them for holy orders. All these measures were pragmatic in nature – it was the social role of the church that mattered, rather than its spiritual role.

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[9]General James Murray, Report of the State of Quebec, 5 June 1762, British Library, King's MSS, 205, ff. 82-88.

Murray noted that the female religious communities were well respected by the people then went on to propose that the British government restrict entry into these communities to women over a certain, though unspecified, age and with a certain sum of money, also unspecified. This, he argued, "would probably soon reform the worst Abuses of such Institutions." Although Murray enjoyed good relations with the nuns in Quebec, it is obvious from this recommendation that he shared the common Protestant belief that communities of nuns preyed upon young girls in straitened circumstances.

A poem printed in 1764 in the Quebec Gazette gives an insight into the common prejudice against the convent amongst Protestants. It was entitled, "The Ceremony of giving a Veil to a Nun."

> Still I recall the Day, fresh on her Cheek
> The purple Bloom of Youth, when Laura bids
> The World Adieu, resign'd its flatt'ring Pomp,
> And took the holy Veil. I view her still
> Beside the Altar, like a Victim deck'd
> Magnificently: Fair as the pearly Dew
> Which on the Rose-bud lies, or hangs within
> The Lily's Cup, what Time Hyperion mounts
> The Eastern Hill. Before the miter'd Priest
> She kneels submissive, on the sacred Floor,
> Casting those Eyes, whose Fires were sure design'd
> To light the Torch of Venus, and provoke
> The amorous Parly; other Office far
> Now doom'd to serve! – Who can unmov'd behold
> Such Sacrifice? Yet 'tis her Choice, and lo
> She sings consenting! Lo, the Prelate cuts
> Her graceful Hair, and strips it of the Gems
> That sparkl'd 'midst her Tresses! then conducts
> The willing Fair one to the Convent's Gate,
> Where she, in one last, one eternal Kiss,
> Dissolves all social Bonds. The Abbess then receives her,
> And invests her beautious Limbs (unfriendly Change)
> In coarse monastic Weeds, while all the
> Virgin Choir in Hymnes announce,
> Thee, Laura, thee become the Spouse of Christ.
> Self-banish'd, self-condemn'd, now to thy Cell,

> Too rigid Maid, retire, and deck it round
> With Bones and Sculls, torn from the ravag'd
> Grave, to paint a gloomy Moral.
> ———Peace be thine,
> And calm Content; nor ever may thine Eyes,
> Like wand'ring Exiles, cast a longing Look
> Back to their native, their forsaken Home.[10]

This was an unusual item for the Gazette; it did not generally publish poetry and although most items were published in both English and French, this was published in English only. It was clearly meant for an English-speaking Protestant audience. Given the context, it must be seen as part of the debate about religion in the colony. The Gazette was not an official organ, although the government used it for public announcements and to publish ordinances. It was published by English-speaking merchants. The ideas expressed in the poem may have been held sincerely or they may have been a convenient stick with which to beat the Catholic Canadians. The author admitted that the postulate entered the convent willingly, but it is clear that he regarded her as a victim and her choice as an unnatural one. He implied that she was too young to understand the choice she was making. This was the "abuse" that Murray sought to prevent in suggesting that the government fix a certain age for entry into the convent. The issue here was the appropriate role for women in society. The choice of the cloistered life was unnatural – women were to be wives and mothers.

Murray's final observation on religion in the colony was a recommendation that the few French Protestants in the colony be encouraged. He suggested that a church might be given them for their use and that a French clergyman, "of sound Sense and good Character," be invited to settle among them, the government paying his salary. Two good consequences would follow from this measure, he thought. Other French Protestants might be induced to come to the colony from France for the sake of religious freedom and it might help to bring about a slow reformation among the Canadians. It

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[10]Quebec Gazette, 6 December 1764.

would at least prove to them that "there is nothing in our Holy Religion repugnant to Virtue or Morality."[11]

The idea of gradually persuading the Canadians to abandon Catholicism appears again and again in the documents concerning policy for the colony. A 1763 Memorandum among the Liverpool papers entitled, "Some Thoughts on the Settlement of Government of our Colonies in North America," acknowledged that the Canadians had been given religious liberty by the Capitulation but noted that this did not "exclude the Government from giving the chief countenance, and the greatest encouragement to Protestant Settlers, & using all prudent expedients for gradually extinguishing Popery." That institution could never coalesce with the British Constitution as:

> The government of the Popish Clergy is a most tyrannical despotism; for as they are accountable only to Spiritual Superiors, who generally support all their usurpations, they assume not only to be Pastors, but Lords of their flock, intermeddle in temporal concerns & have great influence & sway at least over the minds of the common people.[12]

To remedy this problem, he suggested that every parish elect its priest. Once these priests were confirmed by the King, they were to be accountable to their congregations. The priests, he predicted, would soon be "as unassuming in that Colony as the Popish Chaplains are in the houses of the nobility & gentry of that persuasion in England."[13] This was a very whiggish proposal and one that was not embraced by the government, but the underlying idea of gradually weaning the Canadians from the Church of Rome recurred again and again.

In the 1770s Francis Maseres offered another suggestion for gradual reformation -- that parish clergy be permitted to marry and be given life endowments if they agreed to use

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[11]General James Murray, Report of the State of Quebec, 5 June 1762, British Library, King's MSS. 205, ff. 82-88.

[12]Memorandum, 10 March 1763, British Library, Liverpool Papers, Add. MSS. 38335, ff. 68-77.

[13]Ibid.

the Church of England liturgy. Maseres was convinced that a third of the Canadians would already have converted to the Church of England by the time of his writing, if the proper measures had been taken from the start.[14] These proposals assumed the supremacy of the civil government over the church, a claim that would have been rejected by the Roman Catholic church. It is an explicitly Anglican assumption – where the Head of the Church is the monarch.

In 1763, General Murray wrote to the Earl of Shelburne respecting applications he had received from both clergy and lay people concerning church government. The church in Quebec had been without a bishop since 1760. It had been proposed that this problem be resolved by the election of a candidate by the chapter in Quebec who, with the consent of the British government, could proceed to Europe for consecration. The vicar-general of Montreal, Étienne Montgolfier, was elected. Murray judged him unfit for the position, giving the following explanation for his opinion:

> He, [Montgolfier], pushed matters so far as to have the dead Bodies of some Soldiers taken up because hereticks should not be interred in consecrated Ground, such Behaviour could not fail of giving great disgust to the King's British Subjects in these parts. If so Haughty and Imperious a Priest, well related in France, is placed at the Head of the Church in this Country, he may hereafter occasion much mischief if ever he finds a proper opportunity to display his Rancour and Malice.[15]

Instead, Murray recommended Jean Olivier Briand, Grand Vicar of Quebec, who had "constantly acted with a Candour, Moderation and Disinterestedness, which bespeak him a worthy, honest man."[16] Murray opposed Montgolfier because of his refusal to subordinate the church to the civil power. Briand was more conciliatory. Hilda Neatby quotes a letter of Briand's on the subject of prayers for King George which shows his position on the proper relations of church and state:

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[14]Neatby, p. 120.

[15]Governor James Murray to the Earl of Shelburne, 14 September 1764, PRO CO 42/1, ff. 50-53.

[16]Ibid.

> I think it would be wrong not to name George in the Canon if it can be done, just as it would be wrong to do it if it cannot be done. It should not be refused without reason, anymore than it should be admitted against the rules. Therefore I concluded that if the church did not forbid it, which they have not been able to prove to me, one should name him, and not to do so would be a trick in which there would be more prejudice than reason....I could not admit that I should be given as a reason that it is very difficult to pray for one's enemies. They are our rulers and we owe to them what we used to owe to the French. Does the church forbid subjects to pray for their Prince? Do the Catholics in the realm of Great Britain not pray for their King? I cannot believe it.[17]

Murray's opposition to Montgolfier's appointment was decisive, although it was not until 1766 that Briand was consecrated Bishop. Once again, the supremacy of the civil over the religious jurisdiction had been asserted.

The consecration of Briand was a significant event. The first candidate had been rejected by the governor of the colony. Instead, Briand, the governor's choice, had been sent to London where he eventually received permission from the British ministers to seek ordination in France. While the Canadian church had been provided with a Bishop, thus ensuring its continuance, the superior authority of the civil government had been clearly established. The church might continue in Quebec, but only if it knew its place.

The Instructions sent to Murray as civil governor, already cited, made the idea of gradual reformation a concrete policy. The preamble to the 33rd Instruction reads: "And to the End that the Church of England may be established both in Principles and in Practice, and that the said Inhabitants may by Degrees be induced to embrace the Protestant Religion, and their children be brought up in the Principles of it."[18] There was never any suggestion that the Canadians should be forced or coerced to renounce their religion although they were excluded from public office because of it. In 1765, the Attorney

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[17]Neatby, p. 27.

[18]Shortt and Doughty, p. 139.

General Fletcher Norton and the Solicitor General William de Grey gave it as their opinion that "His Majesty's Roman Catholick Subjects residing in the Countries ceded to His Majesty in America...[were] not subject, in those Colonies, to the Incapacities, disabilities and Penalties," to which Catholics in England were subject.[19] The Draft Instructions of 1766, although they were never sent, were not held back because of their admission of the Catholic Canadians to juries or to the practice of law in the colony.[20]

By 1768, the highest legal opinion in Britain asserted that since the King was "bound by no legal or Constitutional necessity to prohibit the profession of that Worship there, He is at liberty to Tolerate the Worship so far and in such forms as not to Impeach or violate his Royal Supremacy and His Majesty may the better to attain that End regulate and Restrain it."[21] In his first letter to Governor Carleton after taking office as Secretary of State, the Earl of Hillsborough wrote:

> Your idea of giving every preference to Clergy Natives of Canada before those of Old France is certainly very judicious; and in my opinion if it could be done in such a manner as to give disgust to the latter, it might be of Advantage. It will certainly be right to discourage the Introduction of foreign Priests, and it may in my opinion be done in such a mode as to be popular and pleasing to the Romish Clergy in that Province.[22]

In a subsequent letter, Hillsborough addressed the subject of the Church of England, informing him that:

> His Majesty does not doubt that you will give all necessary protection to the new subjects in the exercise of their religion, and is pleased to recommend it to you particularly to countenance the established Church,

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[19]Fletcher Norton and William de Grey to the Lords Commissioners for Trade and Plantations, 10 June 1765, British Library, Newcastle Papers, Add. MSS. 32982, f. 25; Report of Atty. and Sol. Gen. re Status of Roman Catholic Subjects, Shortt and Doughty, p. 171.

[20]Draft Instructions to Governor James Murray, 17 February 1766, British Library, Newcastle Papers, Add. MSS. 32982, ff. 27, 28.

[21]James Marriott, William de Grey and E. Willes, Opinion, 18 January 1768, PRO CO 42/7, ff. 4-6.

[22]Earl of Hillsborough to Lieutenant Governor Guy Carleton, 6 March 1768, PRO CO 43/8, ff. 1-5.

> and to take care that the Offices of it are administered with a decency corresponding to the purity of its principles.[23]

The twin aims of British policy are evident in these two letters: conciliating the new subjects of the King by permitting them to worship as they chose while severing any connection with the European hierarchy of the Catholic church, and encouraging a reformation of the religious life of the colony so that it would better fit into the society they were attempting to construct – the monarchical, aristocratic and Anglican social order with which they were familiar.

The policy can be seen in practice in an incident related by Hector Theophilus Cramahé in a letter to the Earl of Dartmouth in 1772. An Irish Franciscan friar, Patrick McTernon, had come into the colony and sought to be employed as a curé or to be admitted to the house of the Récollets. Cramahé, acting Governor at the time, refused, giving as his reason:

> He has studied in foreign Colleges, had resided some Time at Rome, and tho' outwardly professing great Attachment to His Majesty's Royal Person, Family and Government, as he might possibly entertain Ideas and Notions unfavourable thereto, it appeared to me advisable to try to get rid of him.[24]

The tolerance of Catholicism in the colony extended only to the Canadiens. The following year, Cramahé, once again writing to Dartmouth, summed up the policy that had long held sway with respect to the colony's religious life.

> It has ever been my Opinion, I own, that the only sure and effectual Method, of gaining the Affections of His Majesty's Canadian Subjects to His Royal Person and Government, was, to grant them all possible Freedom and Indulgence in the exercise of their Religion, to which they are exceedingly attached, and that any Restraint laid upon them in Regard to this, would only retard, instead of advancing, a Change of their Ideas respecting religious Matters; by Degrees the old Priests drop off, and a few

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[23]Earl of Hillsborough to Governor Guy Carleton, 12 October 1768, PRO CO 43/8, f. 27.

[24]Hector Theophilus Cramahe to the Earl of Dartmouth, Secretary of State, 11 November 1772, PRO CO 42/8, ff. 109-110.

> years will furnish the Province with a Clergy entirely Canadian; this could not be effected without some person here exercising the Episcopal Functions, and the Allowance of a Coadjutor will prevent the Bishops being obliged to cross the Seas for Consecration, and holding personal Communication with those, who may not possess the most friendly Dispositions for the British Interests.[25]

The three major points of British policy are present in this letter: the Canadiens permitted to practice their religion, severance of the ties to Europe, particularly to Rome, and the gradual transformation of the Canadian church. Note that the Canadiens were to be granted the indulgence of the free exercise of their religion. It is by the grace of the King rather than by any right to freedom of religion, that they were permitted to worship as they pleased.

In June of 1771 the Solicitor General of Britain, Alexander Wedderburn, was directed "to take into consideration several reports and papers relative to the laws and courts of judicature of Quebec, and to the present defective mode of government in that Province, and to prepare a plan of civil and criminal law for the said Province."[26] In his report, dated 6 December 1772, Wedderburn said that in the course of his reflections on the laws and courts of Quebec, he had found himself "led into a discussion of the form of government, and of the religion of the Province, which must necessarily have great influence upon the plan of civil and criminal law proper to be adopted there."[27] He opened his discussion with a consideration of the conquest of the country. Some lawyers had argued, he said, that by right of conquest, the conqueror might impose whatever laws he chose. But these lawyers had failed to distinguish between force and right.

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[25]Hector Theophilus Cramahe to the Earl of Dartmouth, Secretary of State, 22 June 1773, PRO CO 42/8, ff. 117-118.

[26]Shortt and Doughty, p. 296, n. 1.

[27]Report of Solicitor General Alex. Wedderburn, 6 December 1772, Shortt and Doughty, pp. 296-305.

The fruits of victory were no longer slaves but subjects, and "no other right can be founded on conquest but that of regulating the political and civil government of the country, leaving to the individuals the enjoyment of their property, and of all privileges not inconsistent with the security of the conquest." The appeal here is to legitimacy – subjects of the King acknowledge and accept the King's authority over them as legitimate. They are not merely held by force.

Wedderburn then took up the question of how the laws of the colony should be made. Since, for practical reasons, it was not possible to reserve that authority to the British legislature, perhaps the model of other colonies should be followed and the legislative power entrusted to an Assembly. Wedderburn rejected this alternative. If the legislature were composed only of British subjects, the Canadians would feel the inequality and fear oppression by the British. But to admit Canadians to the Assembly would be a "dangerous experiment with new subjects, who should be taught to obey as well as to love this country, and, if possible, to cherish their dependence upon it." Wedderburn also feared that an Assembly would be a source of dissension between the Canadian and British subjects, a prediction which was to prove true in the nineteenth century.

When it came to a question of who would elect an Assembly, the problems multiplied. An Assembly chosen only by the British subjects could not be regarded as representative. That the body be somehow representative in nature was essential to its legitimacy. His next cavil is most interesting. If every Canadian proprietor of land were permitted to vote, "men of condition" would be disgusted, since they were "accustomed to feel a very considerable difference between the seignior and the censier, though both alike are proprietors of land." Wedderburn also felt that such a measure would not benefit the men of inferior rank, "for every mode of raising them to the level of their superiors, except by the efforts of their own industry, is pernicious."

No mention was made of the Catholicism of the Canadiens which had long been held to exclude them from participation in public life. The opinions of the legal experts in 1765 and 1768 had been accepted. The problem described was that the pattern of land-holding in the colony did not conform to that of England. So the usual qualification for voters, the possession of land, included men in the colony who ought not to be included. Nor did Wedderburn believe any measure should be taken that would tend to upset the proper hierarchical organization of the society. The only answer was legislation by the Governor and Council, with confirmation in Great Britain.[28]

Wedderburn then turned to the subject of the religion of Canada, "a very important part of its political constitution." He dismissed the freedom of religion granted to the inhabitants by the Treaty of Paris, because of the qualifying clause in the treaty, "as far as the laws of England will permit." As a result, he argued, the Canadians must depend on the "benignity and wisdom" of the King's government for the protection of their religious rights. And this made it a question of policy on the part of the government. According to Wedderburn, the safety of the state had often been endangered by restrictions on religious practice, but never by toleration. Therefore, the Canadians should be permitted to practice their religion freely. It followed from this policy that their priests should be protected and "a maintenance secured for them."[29]

But beyond this the Canadians had no claim either on the justice or humanity of the crown. "Every part of the temporal establishment of the church in Canada, inconsistent with the sovereignty of the king, or the political government established in the province may justly be abolished." No ecclesiastical jurisdiction derived from Rome could therefore be permitted, nor could the Jesuits who by their constitution refused allegiance

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[28]Ibid.

[29]Ibid.

or obedience to the King. Wedderburn very neatly summed up the pattern of British policy towards the Catholic Church in Canada:

> The point then, to which all regulations on the head of religion ought to be directed is, to secure the people the exercise of their worship, and to the crown a due controul over the clergy.[30]

It was in this context that the Quebec Act was drafted and passed in 1774. It was not a departure from the long-standing policy of the King's ministers or the colony's Governors. Its conciliatory policy, praised as an advance towards toleration, can be construed as essentially conservative.[31] It resulted from the need to win the allegiance of the Catholic colonists and the understanding of the church as a necessary part of the political order. It was not the spiritual role of the church that mattered; it was its role in maintaining the social and political order. As John Graves Simcoe put it a few years later:

> The best security that all just Government has for its existence is founded on the Morality of the People, and... such Morality has no true basis but when placed upon religious principles.[32]

The Quebec Act made the tithes owed to the Catholic clergy enforceable by law, although it exempted Protestants from paying such tithes. It reserved the right of the King to levy tithes on Protestants for the support of a Protestant clergy. This is entirely consonant with the understanding of the church as part of the civil administration. The Governors had long acted as though this was the case, using the curés to publish ordinances, enforcing attendance at church, and backing the collection of money for the building of churches with the sanction of the civil government.

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[30]Ibid., p. 298.

[31] Philip Lawson has argued that it was their belief in the "elastic" nature of the ancient constitution that enabled the British policy-making elite to offer these concessions to Quebec's Catholics. It was the glory of the constitution that it could accommodate such changes. Philip Lawson, The Imperial Challenge: Quebec and Britain in the Age of the American Revolution, (Montreal and Kingston: McGill- Queen's University Press, 1989); see also Philip Lawson, "A Perspective on British History and the Treatment of Quebec," Journal of Historical Sociology 3, 3 (1990): 253-271.

[32]Lieutenant Governor John Graves Simcoe to Henry Dundas, 6 November 1792, Devon Record Office, Simcoe MSS., 152M/C1792/OC1.

The Quebec Act was deemed to be one of the Intolerable Acts by the colonists to the south, who resented the extension of Quebec's boundaries, the lack of an assembly and, significantly, the establishment of Catholicism in a British colony. All of these were seem as examples of the British government's arbitrary rule. Toleration for Catholicism was equated with an invasion of the liberty of the people, because Catholicism itself was associated with arbitrary rule. In contrast, Philip Lawson has argued that the Quebec Act represented a significant movement towards toleration on the part of the British government. He concludes that "those who supported the Quebec Act and grasped the nettle of toleration" in 1774 best deserve the title of radicals.[33] While I do not wish to dispute his conclusion, I would like to suggest that the pragmatic solution to Quebec's problem proposed and implemented in the Quebec Act can be seen as part of a conservative approach to governance. It was not respect for the religion of the Canadians that prompted the government to admit Catholics to participation in public life, but an understanding of the nature of a stable social order. The church was an essential pillar of society: it ratified the monarchy, it encouraged the due submission to the civil authority that was seen as the appropriate role of subjects of the King and it justified and legitimated the hierarchical order. The specific problem with the Catholic religion in the eyes of the government was political. Catholics gave allegiance and owed obedience to an authority other than the King – to the Pope. If that connection could be severed, and they believed it could be, then they believed they had little to fear. This is one of the instances in the government of the colony in which the pattern of choices made by the governor and his superiors in London revealed their priorities, their understanding of the political order and the "ancient constitution."

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[33]Lawson, Imperial Challenge, p. 151.

Conclusion

Two notions of social organization contended in the colony of Quebec after the Conquest. The Governors in the colony and the policy-makers in London endeavoured to establish a stable and legitimate civil administration by patterning it after the familiar structures of England – the much-venerated British constitution. But theirs was a conservative interpretation of the constitution and the political order they articulated was both conservative and paternalistic. They understood authority to be derived from the King who held it by divine grant. They regarded the colonists as subjects of the King, who were to be protected by His Majesty's Paternal Care and who, in turn, owed the King obedience and due submission. It was a hierarchically ordered society they envisioned, one where men of property ruled by right and all were knit together in a network of obligation and deference. Such a society was stable, they believed.

The Governors appear as defenders of the Canadiens for one very important reason: they needed to win their loyalty since they could not hope to hold the colony by force alone. They sought to create a legitimate administration, first by basing it on law – on the recognition of the guarantees given in the capitulations of Quebec and Montreal and the Treaty of Paris and on the common law principle that a conquered people retained their laws until the new sovereign changed them. Because the British felt themselves bound by law, the Canadiens were granted security of property and the right to the free exercise of their religion. Security of property was broadly defined and was understood to encompass such things as seigneurial land tenure and the right of priests to tithes, even though these were unknown to the eighteenth-century British constitution.

Secondly, the Governors refused to overturn French civil law in the colony, especially laws respecting inheritance, land tenure and dower rights, because such a change would have caused hardship and distress among the Canadiens. Nor would they permit the creation of the legislative assembly promised by the Proclamation of 1763 as long as it

would have excluded the Canadiens. Dominated by the English-speaking merchants, such an assembly most certainly would have passed legislation contrary to the interests of the Canadiens.

Pragmatic policy considerations influenced the Governors as well. When the exclusion of Catholics from public life made the implementation of the conservative political structure they envisioned unworkable, they chose the structure over the anti-Catholicism of the British constitution and moved to permit the Canadiens to sit as jurors, to act as lawyers, and to fill public offices. They believed that landed men were more important to a stable political order than Protestant men. It may be that they were aided in this decision by the fact that the colony was distant enough from Britain that the Catholicism of its inhabitants could pose no threat to the mother country. Certainly no such decision was taken in Ireland.

But the Catholicism of the Canadiens was only one of the challenges the Governors faced in attempting to establish a legitimate civil administration in Quebec. The English-speaking merchants in the colony held a significantly different notion of social organization. Legitimate authority, in their eyes, derived from their participation in rule. They saw themselves as citizens of a state rather than as subjects of the King. Stability was less important to them than to the colonial administrators. They were more interested in opportunity.

According to the understanding of the merchants, the role of the state was to provide its citizens with certain services: security of property, the legal machinery for the enforcement of debt payment and legislation that met their needs. They clamoured for a legislative assembly, first, because they believed that only their participation in government rendered it legitimate, and second, because they believed that such an assembly would not pass legislation inimical to their interests. Since they assumed that the Canadiens would be excluded from such an assembly, they believed that they would

be the lawgivers in the colony. In this sense, they agreed with the Governors: they regarded the Canadiens as mere subjects of the King, not entitled to participation in the state. However, as freeborn Englishmen, as citizens, they believed they had a right to representation and to English law.

The similarities to the rhetoric of the leaders of the colonial assemblies to the south ought not to be surprising. The merchants had much in common with their southern counterparts. Many of them had lived there before coming to Quebec. They were not dependent on the Crown for their incomes – even the Governors themselves lamented their lack of patronage which they regarded as an essential tool for political control. They could not see how they were to control prominent men in the colony without the dispensation of offices. The merchants were not landed men. They lived in a world where success was measured in dollars and pounds rather than in titles and acres. A level playing field was what they desired, although they were not averse to conditions skewed in their favour.

Where the Governors spoke of due subordination, the merchants spoke of liberty. Where the duties of the subject were emphasized by the elite, the rights of freeborn Englishmen were claimed by the merchants. Where the Governors stressed the Paternal Care of the King for his subjects, the merchants insisted on a representative assembly. Where the administration relied on well-connected men of probity as the King's servants on the bench, the merchants pressed for professional lawyers as judges.

The passage of Quebec Act did not mean the end of the tension between the two conceptions of the political order. The merchants campaigned for its repeal and after the American Revolution, the influx of Loyalists strengthened the merchants' party in both numbers and resolve. For example, in 1786, the merchants argued for the repeal of the

Quebec Act in part because the Loyalists deserved, "a Government similar, or superior, to that under which they were Born, had lived and were happy."[1]

Such proposals alarmed the Canadiens, of course. Other events increased their alarm. When Governor Carleton, now Lord Dorchester, returned to the colony in 1786, he brought with him the newly appointed Chief Justice, William Smith. In December 1786, Smith, as Chief Justice, made a critical judgement on a case in the Court of Appeals. Alexander Gray, the Solicitor General, had sued William Grant, a merchant, for a debt as curator of his late uncle's estate. Grant lost the case in the Court of Common Pleas and appealed to the higher Court, arguing that Gray did not have the right to sue him as his curatorship was not valid. Smith ruled in Grant's favour, declaring that Gray's curatorship was invalid because it had been granted under Canadian law. He argued that when both parties were English, English law applied. This reversed the practice since 1775, where Canadian civil law had been applied to all cases.

An Address to the Governor signed by two hundred and eighty-three Canadien subscribers protested this innovation. The address begins by expressing astonishment at the "new requisitions of His Majesty's Antient Subjects" at a time when they had thought disturbances had ceased. These changes would have "a tendency to nothing short of a Subversion of the fundamental Laws which govern His Majesty's new Subjects to an annihilation of them and by that means of their Estates." The Canadiens were, however, confident in the paternal care of their sovereign:

> When our most gracious Sovereign is informed that the whole of a People who have never discontinued their fidelity to him, are uniting to implore His Justice and his Equity for continuing to them their Common Law; a Law whereupon are founded their Estates, their Fortunes and their property, a Law which the Right of Nations assures to them; which the Capitulation has promised to them; which a Proclamation has solemnly ratified; and which an Act of His Majesty's August Parliament passed in

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[1]Petition of the merchants of Quebec and Montreal to the King, the Lords Temporal and Spiritual and the Knights, Burgesses and Commons in Parliament, PRO CO 42/11, ff. 80-81.

> the fourteenth Year of His benign reign has affirmed and warranted to us; When His most Gracious Majesty condescends to cast an Eye upon this Extensive Country inhabited by a people desirous of preserving it to him, and then compares the numbers of persons who are so faithfully attached to him, their Estates and possessions (whereof the fundamental principles are attempted to be subverted) with the fewness of antient Subjects, and their so little property; have we not to hope that our most Gracious Sovereign will further strengthen and render still more durable the Constitutional & municipal Laws of his faithful and Loyal Subjects of Canada?[2]

The Canadiens had learned how to appeal to the Governor. They understood or shared the assumptions which had governed the policy towards them and their civil law since the Conquest. First, they appealed to the paternal care of the King. Then they founded their claim on law, both natural law (the Right of Nations) and formal law (the Capitulation). Next they referred to the Proclamation and to the Quebec Act. Stressing throughout the fidelity of the Canadiens, they finally pointed out their superiority in both numbers and property to the English-speaking colonists, "His Majesty's Antient Subjects."

In early 1787, Chief Justice Smith proposed a new ordinance on the courts of justice rather than a renewal of the expiring one. The new ordinance formalized the ruling that Smith had given in the case of Gray vs. Grant. If both parties were English, English law would apply. This proposed ordinance created controversy within the Council and an alternative bill was proposed by Paul Roch St. Ours. The merchants asked to appear before the Council to make representations on the bills. In their petition to be heard against the second proposal the merchants claimed that if that ordinance should be passed:

> your Petitioners and others in whose behalf they petition, would be deprived of those colonial and Constitutional rights which by the

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[2]Translation of an Address, 23 February 1787, PRO CO 42/11, f. 76; Names of the Subscribers to the Address, PRO CO 42/57, ff. 345-346.

> Wisdom and Justice of His Majesty's Government are held and enjoyed by all his Majesty's Subjects in all other, the colonies of Great Britain, and which his Majesty has been graciously pleased to recommend might be fully extended to his Subjects in this Province – That by the said Ordinance if passed into a Law they would be deprived of various rights which they are entitled to, and part of which in some degree they have enjoyed in this Colony; rights which they humbly conceive it is infinitely important should not be Contracted but enlarged as essential to the Safety and protection of His Majesty's Subjects, of their persons and property, and as necessary to continue the present, and increase the future Commerce, growth, population and prosperity of the Province.[3]

James Monk, the Attorney General of the colony, acted as their lawyer and presented their case. He spoke for six hours, criticizing the entire system for the administration of justice. He attacked the courts as they stood, the judges and the laws.[4]

He had three major complaints: the judges were inconsistent in their judgements; they showed partiality in their judgements, granting by "grace and favour" to one what they would not grant to another; and there was great confusion in the courts. The confusion had a number of causes ranging from the mixed and inexpert application of French civil law and English law, to poor record-keeping, to careless procedure. One common thread that runs through this litany of complaint is a critique of amateur judges, men not trained in the law. Apparently, men of sound sense and probity were insufficient for the needs of the merchants. Another was that predictability at law was necessary to carry on the commerce of the colony.

The merchants submitted a written summary of the main points of Monk's presentation in support of their petition. They first offered detailed estimates to show that the English-speaking merchants owned or controlled well over a million pounds Sterling in goods and capital and that there were then in the colony over fifteen thousand of His

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[3]The Petition of the Subscribing Citizens of Quebec, 6 April 1787, PRO CO 42/52, ff. 59-60.

[4]Neatby, pp. 212-214.

Majesty's Antient Subjects, many of whom were Loyalists who had no knowledge of the French civil law. Having thus demonstrated their importance, they then argued:

> That the French Laws as said to be established and as proposed to be continued, are wholly inadequate to Secure the peace and prosperity of the King's Natural born Subjects, residing in the Province, or wisely and justly to protect and Govern Commercial rights, or to hold out as means (but would prove a powerful bar) to population....That the Constitutional principle of Colonization in every modern empire, is the extension to Such Colony of the National Laws for securing personal rights of the Natural born Subjects. That, such would be the only wise and political means to populate this extensive Colony, to increase its Commerce, to improve its utility and subordination to Great Britain and in that, by those Laws to render the people wealthy, numerous and happy.

Here they reiterated an argument that dated from the Proclamation of 1763. Only the benefits of English law would draw settlers to the colony.

They went on to say that although the understanding in the province had been that the Quebec Act introduced the French civil law into the Province, it had not been consistently applied by the judges.

> That the uncertainty in the judicial proceedings & Judgements of Law and in the exercise of a Judicial authority not founded on the Laws of the Province that legally ought to prevail and thereby legislating will stand proved upon inquiry into the several cases stated at the bar of the Council and others which your Petitioners are ready to adduce. That there was not that essential uniformity in the Judgements and regularity in the proceedings of the said Courts, absolutely requisite to secure the rights of the subject....That from the want of certainty in the rule of Right, and of Known Laws, Suited to the Interests of the Nation and its Commerce in this Province, infinite distress had fallen on the King's Subjects, and had occasioned great disturbances in their minds. That the Laws proper to be established were the Laws of England, in personal and civil rights especially between all His Majesty's antient Subjects, and between any of His Majesty's Subjects, in any Commercial case.[5]

Certainty and predictability were what was lacking in the proceedings of the courts. It was not that the proceedings were corrupt or unjust, but that they could not know what

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[5] Paper B. Merchants, Heads of the different subjects, 18 April 1787, PRO CO 42/52, ff.60-64.

to expect when they filed a suit. The judges, lacking legal training, simply were not professional enough for the merchants' needs. Here is a clear instance of the impetus for change to a modern, professional judiciary. The older system where the personal weight of the judge was sufficient to legitimate his judgements was no longer adequate to the needs of commerce.

Of course, the Judges of the Court of Common Pleas protested this attack on their characters and reputations vehemently.[6] A lengthy but inconclusive investigation into the courts was launched. Ultimately, no changes were made, and Monk was dismissed by Secretary of State Sydney for his intemperate speech and replaced by Alexander Gray who had acted for the judges in the investigation.[7] Clearly, the government sided with the judges.

This incident from 1787 shows the same cleavages that existed in 1764. The two camps could not be reconciled, because their conceptions of the nature of the political order and its legitimacy differed at the level of fundamental assumptions. Such differences are rarely reconcilable. The only solution that could be seen was the division of Upper Canada from Lower Canada by the Constitutional Act of 1791. The issue of legitimacy continued to shape the politics of the colony in the years after 1791. Various measures were taken in an effort to enhance and maintain the legitimacy of the civil government, measures that reflected changing conceptions of political legitimacy. The Union of the Canadas, the move to responsible government, even Confederation itself can be seen as experiments in legitimacy.

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[6] Adam Mabane, John Fraser and Pierre Panet, Memorial to the Governor , Lord Dorchester, 1 May 1787, PRO CO 42/57, ff. 353-354.

[7] Neatby, p. 218.

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Appendix A

All the Ordinances since the Establishment of Civil Government in August 1764, to the 3rd of June 1765, inclusive

1. An Ordinance, Relating to the Assize of Bread, and for ascertaining the Standard of Weights and Measures in the Province of Quebec.
2. An Ordinance for Regulating and Establishing the Currency of the Province.
3. An Ordinance for Regulating and Establishing the Courts of Judicature, Justices of the Peace, Quarter Sessions, Bailiffs and other matters relative to the Distribution of Justice in this Province.
4. An Ordinance for Ratifying the Decrees of the Several Courts of Justice Established in the Districts of Quebec, Montreal and Trois Rivières, Prior to the Establishment of Civil Government, throughout this Province upon the 10th day of August 1764.
5. An Ordinance declaring what shall be Deemed a due Publication of the Ordinances of the Province of Quebec.
6. An Ordinance for the better discovering and Suppressing Unlicensed Houses.
7. An Ordinance, to prevent Forestalling the Markets, and Frauds by Butchers &c.
8. An Ordinance for Quieting People in their Possessions, and fixing the Age of Maturity.
9. An Ordinance, for preventing Persons Leaving the Province without a Pass.
10. An Ordinance for Registering Grants, Conveyances, and other Instruments in writing, of or concerning any Lands, Tenements or Hereditaments within this Province.
11. An Ordinance for the better observing and keeping the Lord's Day.
12. An Ordinance, to prevent disorderly riding Horses, and driving Carts, Trucks, Sleds, Slays or any other Carriage whatsoever, within the Towns of this Province, and for Regulating the Rates of Horses and Carriages, for travellers within said Province.
13. An Ordinance for Ascertaining Damages on protested Bills of Exchange.
14. An Ordinance to prevent Rum, and other Strong Liquors being sold to the Indians.
15. An Ordinance, for Amending and Explaining an Ordinance of His Excellency the Governor and Council of this Province, made the Twentieth day of September last, Intituled an Ordinance for Ratifying & Confirming the Decrees of the several Courts of Justice Established in the Districts of Quebec, Montreal and Trois Rivières, prior to the Establishment of Civil Government throughout this Province, upon the 10th day of August 1764; and for Enlarging the time for Lodging Appeals from the Decrees of such Courts therein mentioned.
16. An Ordinance for Billeting His Majesty's Troops, on Private Housekeepers in this Province.
17. An Ordinance, for explaining and amending the Ordinance of the 12th Instant, for Quartering His Majesty's Forces in this Province.

18. An Ordinance, to prevent the goods and effects of Persons absenting themselves from, or Residing out of this Province, in the Possession of any Merchant, Factor, Trader, Agent, Attorney or Trustee, from being taken away, delivered up, Transferred or removed 'till the Debts due and owing by such absentees or Persons residing out of this Province, to any Person or Persons residing within the same, be first paid, or secured to be paid...
19. An Ordinance Directing that all Grand and Petty Juries, hereafter to serve at any Court of Record, Court of Assize and General Gaol delivery in this Province, shall be Summoned and Returned from the Body of the Province at large, without Distinction or Regard to the Vicinage of any particular District within the same.
20. An Ordinance for Explaining an Ordinance for the better discovering and Suppressing Unlicensed Houses, made and Passed the Third day of November last.
21. An Ordinance, for Preventing Fishermen, or other Persons, from throwing overboard the Offals of Fish on the Fishing Grounds &c in this Province.
22. An Ordinance, in Addition to an Ordinance, Published the 4th day of October last "for Regulating and Establishing the Currency of the Province".
23. An Ordinance, relating to Soldiers and Seamen, and preventing Desertion and Imprisonment of their Persons for Debt, or pretence thereof, and for Liberating Soldiers now in Prison for Debt.
24. An Ordinance, for Adjourning Trinity Term next ensuing, and every other Succeeding Trinity Term, and for hearing and determining certain Offences, at the Town of Three Rivers in this Province.[1]

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[1]James Murray to the Board of Trade and Plantations, 15 July 1765, PRO CO 42/3, ff. 72-119.

Appendix B

Fair Copy of a Commission 22 May 1765 annexed to Murray's letter to the Board of Trade and Plantations 15 July 1765:

George the Third...

Know ye that we have Assigned you Jointly and Severally, and every One of you, Our Justices to keep our Peace in the District of our City of Quebec in our Province of Quebec in America, And to keep and cause to be kept all Ordinances and Statutes for the good of the Peace, and for the preservation of the same and for the quiet Rule and Government of our People, in all and Singular their Articles in the District aforesaid, According to the force, form and Effect of the same and to Chastise and punish all Persons that Offend against the Form of those Ordinances and Statutes, And to cause to come before you, all those who to any one or more of Our People concerning their Bodies or the Firing of their Houses, have used Threats, to find Sufficient Security for the Peace or their good behaviour, towards us and Our People, and if they shall refuse to find Such Security, then to put them in our Prison untill they shall find such Security to cause to be safely kept, We have also Assigned you and every Two or more of you Our Justices to Inquire the Truth more fully by the Oaths of Good and Lawfull Men of Our Province aforesaid, by whom the Truth of the matter shall be the better known of all and all manner of Felonies, Poisonings, Inchantments, Sorceries, Artmagick, Trespasses, Forestallings, Regratings, Ingrossings and Extortions whatsoever, and of all and Singular other Crimes and Offences of which the Justices of Our Peace, may or ought Lawfully to Inquire by whomsoever and after what manner soever in the said District done or Perpetrated or which shall happen to be there done or attempted And also of all those who in the aforesaid district in Companies against the Peace, in Disturbances of Our People with Armed Force have gone or Rode or hereafter shall presume to go or Ride And also of all those who have there lain in wait or hereafter shall presume to lie in wait to maim Cut or kill Our People, And also of all Victualers[sic] and all and Singular other Persons, who in the abuse of Weights or Measures, or in Selling Victualls against the Form of the Ordinances and Statutes or any of them therefore made for the Common Benefit of that part of Our Kingdom called England and of our People thereof, or any Law, Ordinance, Rule, or Regulation of our said Province of Quebec now, or hereafter made or to be made, have offended or Attempted or shall hereafter shall presume in the said District to Offend or Attempt, and also of all Sheriffs, Provost Marshalls, Bailiffs, Stewards Constables Keepers of Goals and all the other Officers who in the execution of their Offices about the premisses or any of them to have unduly behaved themselves or hereafter shall presume to behave unduly, or have been or shall hereafter happen to be careless, remise or negligent in Our said District And of all and Singular Articles and Circumstances, and all other things whatsoever that concern the Premisses or any of them by whomsoever and after what manner soever in our aforesaid District, done or Perpetrated Or which hereafter shall there happen to be done or attempted or in what manner soever. And to Inspect all Indictments whatsoever so before you or any of you taken, or to be taken, and to make and Continue Processes thereupon against all and Singular the Persons so Indicted, or who before you hereafter shall happen to be Indicted

untill they can be taken Surrender themselves or be Outlawed: And to hear and determine...

Provided always that if a Case of difficulty upon the Determination of any of the premisses before you or any Two or more of you shall happen to arise then let Judgement in no wise be given thereon, before you or any two or more of you unless in the presence of Our Chief Justice of Our Province of Quebec aforesaid. And therefore we Command you and every of you that keeping the peace Ordinances, Statutes and all and singular other the Premisses, you diligently apply yourselves and that at certain days and places as you or any two or more of you shall appoint for those Purposes into the Premisses, Ye make Inquiries and all and singular the premisses, ye hear and determine and perform and fulfill them in the aforesaid Form, doing therein what to Justice Appertaineth according to the Law and Custom of that part of Great Britain called England, and the Laws Ordinances Rules and Regulations of our said Province in that behalf, made or hereafter to be made, Saving to us the Amerciaments, and other things to us therefrom belonging For we will Command all and every Our Sheriffs ...

Lastly We have assigned you the aforesaid Samuel Gridley Esquire Keeper of the rolls of Our Peace in Our said District and therefore you shall cause to be brought before you and your said Fellows at the days and Places aforesaid the Writs Precepts Processes and Indictments aforesaid, that they may be Inspected and Course determined as aforesaid....